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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (A CALIFORNIA LEGISLATIVE COMMITTEE), ET AL., PETITIONERS,

vs.

WILLIAM PATRICK BRANDHOVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1950.

CERTIORARI GRANTED DECEMBER 11, 1950.

No. 12430

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM PATRICK BRANDHOVE,

Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California legislative committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the Northern District of California, Southern Division

No. 28711H

WILLIAM PATRICK BRANDHOVE,

Plaintiff,

vs.

JACK B. TENNEY; THE SENATE FACT FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California legislative committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON; and ELMER E. ROBINSON,

Defendants.

COMPLAINT FOR DAMAGES UNDER CIVIL RIGHTS ACT

Plaintiff complains of Defendants, and each of them, and for cause of action alleges:

1. The Action arises under the 14th Amendment to the Constitution of the United States, section 1, and under R.S. section 1979, U.S.C. Title 8, section 43, and under R.S. section 1980, U.S.C. Title 8, section 47 (3), and under sections 19 and 20 U.S. Criminal code, U S.C. Title 18, sections 51 and 52.

2. Plaintiff is a citizen of the United States and of the State of California; defendant the Senate Fact-Finding Committee on Un-American Activities is a legislative committee duly created under

the constitution of the State of California by California Senate Resolution No. 75, June 20, 1947, a copy of which resolution is marked Exhibit "A" attached hereto, referred to, incorporated in and made a part hereof by this reference; defendant Jack B. Tenney is, and at all times mentioned herein was the duly appointed chairman of said legislative committee, hereinafter called The Tenney Committee; defendants Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, and each of them, are, and at all times hereinafter mentioned were duly appointed members of The Tenney Committee.

3. On January 28, 1949, plaintiff circulated a petition entitled: "A Protest Against a renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the Legislature of the State of California at the State Capitol in Sacramento. A copy of said petition is marked Exhibit "B," attached hereto, referred to, incorporated in and made a part hereof by this reference. The subject matter of said petition was stated therein as follows:

"I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck

Havenner's opponent, conspired with the Tenney Committee to this end."

and the purpose of said petition, as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff was engaged in circulating said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to wit: January 29, 1949. Said subpoena did not refer to or state the purpose or object of said hearing or refer to or state the purpose or object of plaintiff's required testimony thereat. A copy of said subpoena is marked Exhibit "C." attached hereto, referred to, incorporated herein and made a part hereof by this reference.

4. On January 28, 1949, before the service of said subpoena on plaintiff, and after the content of said circulated petition had become known to defendant Jack B. Tenney, said defendant immediately communicated by telephone with defendant Elmer E. Robinson advising him of the charges contained in said petition and the stated purpose of same; then and there said defendants Jack B. Tenney and Elmer E. Robinson discussed ways and means of best thwarting the charges contained in said petition and defeating the purpose stated in said petition and agreed that a hearing should be held on the following day by The Tenney Committee whereat defend-

ant Elmer E. Robinson should appear as a voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition.

5. On the same day, to wit: January 28, 1949, after the circulating of said petition, defendants Jack B. Tenney and Hugh M. Burns, by telegrams to the District Attorneys of the City and County of San Francisco and the County of Alameda, State of California, signed by them as chairman and vice chairman of The Tenney Committee and acting on behalf of said committee demanded of each of said District Attorneys: "to either immediately charge Brandhove (plaintiff) with perjury or to take the matter before the San Francisco (Alameda) grand jury." Copies of said telegrams are marked Exhibit "D" and Exhibit "E" respectively, attached hereto, referred to, incorporated in and made a part hereof by this reference.

6. Pursuant to said subpoena plaintiff appeared before The Tenney Committee on the 29th day of January, 1949 and on that day a hearing was held by said committee. At said hearing defendant Elmer E. Robinson appeared as a voluntary witness. At said hearing all individual defendants except defendant Elmer E. Robinson, were sitting as members of the Tenney Committee.

7. Said hearing of The Tenney Committee on January 29, 1949, was held, as was known to all defendants, for the purpose and object of suppressing

the criticism of plaintiff in his circulated petition and the charges therein directed against The Tenney Committee and the individual defendants, to the end that said committee should obtain the appropriation of funds requested from the California Legislature.

8. In pursuance of said end The Tenney Committee and its members acted as judges and accused in the same cause at said hearing and held and conducted the same in an unfair, partial and unlawful manner. At said hearing defendant Elmer E. Robinson was permitted to and did make a lengthy unsworn statement first, and after having been sworn as a voluntary witness, was led by defendant Jack B. Tenney to and did answer the different charges contained in plaintiff's said petition whereby unbridled discretion was left to said defendant Elmer E. Robinson in the conduct of his self-justification. At said hearing specific questions were directed to plaintiff with regard to his personal affairs and acquaintances to which The Tenney Committee previously had obtained sworn answers from plaintiff. At said hearing defendant Jack B. Tenney read into the record of the hearing a false alleged criminal record of plaintiff and a newspaper article wherein an affidavit of plaintiff was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to defendant Jack B. Tenney "that Mr. Brandhove (plaintiff) was a liar." At said hearing plaintiff's counsel, although he was not summoned by The Tenney

Committee to appear at said hearing but was present thereat solely in his professional capacity as plaintiff's attorney, was called as a witness by said committee and interrogated at length about his private affairs, and when plaintiff's said counsel referred to decisions of the United States Supreme Court supporting the objections raised by plaintiff against said hearing and supporting plaintiff's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room. A copy of the record of said hearing is marked Exhibit "F" attached to the original of this complaint, referred to, incorporated herein and made a part hereof by this reference. The written objections of plaintiff filed at said hearing are part of the record of said hearing. Upon said objections plaintiff refused to answer questions at said hearing.

9. At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of plaintiff's refusal to answer questions at said hearing.

10. Such complaint charging plaintiff with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by defendant Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. Upon said complaint, plaintiff was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949.

11. Plaintiff committed no public offense at said

hearing on the grounds that the resolution creating The Tenney Committee (Exhibit "A") if read into any criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949, was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of plaintiff, to wit: his rights of free speech and to petition the Legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating The Tenney Committee; that the questions asked of plaintiff at said hearing were not material and proper as required by section 9412 of the California Government code.

12. Plaintiff was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949, on which date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction. Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the plaintiff discharged.

13. The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff.

14. The acts of defendants except defendant Elmer E. Robinson were done under color of the authority conferred upon defendant The Tenney Committee by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said committee (Exhibit "A"). All defendants including defendant Elmer E. Robinson conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner hereinabove set forth.

15. By the conduct of defendants hereinabove set forth plaintiff has suffered great physical hardship and mental pain and anguish and has incurred expenses in the amount of ten thousand dollars ($10,000.00) for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense against said criminal complaint. Plaintiff also demands punitive damages.

Wherefore, plaintiff demands judgment against defendants, and each of them in the sum of Two hundred fifty Thousand dollars ($250,000.00) and costs.

/s/ MARTIN J. JARVIS,

/s/ ELMER P. DELANY,

/s/ RICHARD O. GRAW,

Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

William Patrick Brandhove, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint; That he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ WILLIAM PATRICK BRANDHOVE.

Subscribed and sworn to before me this 17th day of March, 1949.

[Seal] /s/ R. M. SPILLANE,
Notary Public, in and for the City and County of San Francisco, State of California.

My Commission expires July 17, 1951.

EXHIBIT "A"

California Senate Resolution No. 75

(Adopted June 20, 1947)

Senate Resolution No. 75, as amended, Relative to the creation of a Senate Fact-Finding Committee on Un-American Activities, to investigate the activities of persons and groups known or suspected to be foreign dominated or controlled and to recommend legislation for their regulation.

Whereas, these are yet times of public danger. Subversive persons and groups are endangering our domestic unity so as to leave us unprepared to resist attack from without and within. Under color of the protection afforded by the Bill of Rights these persons and groups seek to destroy our freedom by force, violence, threats, undermining and sabotage, and to subject us to the comination of foreign powers and ideologies; and

Whereas, there is danger that the ordeal through which the Country has suffered to keep the pursuit of its ideals free may be in vain; and

Whereas, persons and groups, motivated by hatred of American ideals, our republican form of government and democratic processes, some bound together by allegiance to foreign powers, are even now seeking to achieve by subversion what we have so valiantly fought to sustain from force; and

Whereas, California, as one of the laboratories of this great Nation, may profitably study the problem within its boundaries, and enact pertinent legis-

lation therein, if facts are available therefor; and

Whereas, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee; now, therefore,

Be it Resolved by the Senate of the State of California,

That

1. The Senate Fact-Finding Committee on Un-American Activities is hereby created and authorized and directed to investigate, ascertain, study and analyze all facts directly or indirectly relating to the foregoing, to the activities of groups and organizations whose membership include persons who are members of organizations who have as their objectives, or part of their objectives, the overthrow of the governments of the State of California or of the United States by force and violence or other unlawful means, all organizations known or suspected to be dominated or controlled by a foreign power which activities affect the conduct of this State in national defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this State supported in whole or in part by public funds, or any political program, or which may affect the conversion of the State from a wartime economy to a peacetime economy or affect the economic and social problems incidental thereto, including but not limited to the operation, effect, administration, enforce-

ment, and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

2. In addition to the foregoing, the Senate Fact-Finding Committee on Un-American Activities is authorized and directed to ascertain, study and analyze all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power, and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social positions, fraternal and casual associations, living standards, race, religion, politics, ancestry and the activities of paid provocation and any other factors which may account for their conduct or condition their action, as well as the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

3. The committee shall consist of six members of the Senate appointed by the Committee on Rules thereof. Vacancies occurring or existing in the membership of the committee shall be filled by the appointing power.

4. The committee is authorized to act during this session of the Legislature, including any recess, and after final adjournment until the final adjourn-

ment of the 1949 Regular Session, with authority to file its final report not later than the last legislative day of that session.

5. The committee and its members shall have and exercise all of the rights, duties and powers conferred upon investigating committees and their members by the provisions of the Joint Rules of the Senate and Assembly and the Standing Rules of the Senate as they are adopted and amended from time to time, which provisions are incorporated herein and made applicable to this committee and its members.

6. The committee has the following additional powers and duties:

(a) To select a chairman and a vice chairman from its membership, and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) To contract with such other agencies, public or private, as it deems necessary for the rendition and affording of such services, facilities, studies and reports to the committee as will best assist it to carry out the purposes for which it is created.

(c) To cooperate with and secure the cooperation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of this resolution and to direct the sheriff of any county to serve subpoenas orders and other process issued by the committee.

(d) To report its findings and recommendations to the legislature and to the people from time to time and at any time, not later than herein provided.

(e) To do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution.

(f) To create subcommittees from its membership, assigning to the subcommittee any study, inquiry, investigation or hearing which the committee itself has authority to undertake or hold, and the subcommittee for the purposes of this assignment shall have and exercise all of the powers conferred upon the committee limited by the express terms of the resolution or resolutions of the latter defining the powers and duties of the subcommittee, which powers may be withdrawn or terminated at any time by the committee.

(g) To adopt and from time to time amend such rules governing its procedure (including the fixing of its own quorum and the number of votes to take action on any matter) as may to it appear appropriate.

(h) To hold public hearings at any place in California at which hearings the people are to have an opportunity to present their views to the committee.

(i) To summon and subpoena witnesses, require the production of papers, books, accounts, reports,

documents, and records of every kind and description, to issue subpoenas and to take all necessary means to compel the attendance of witnesses and procure testimony.

(j) To report its findings and recommendations to the Legislature and to the people from time to time and at any time, not later than herein provided.

7. The committee, each of its members, and any representative of the committee thereunto authorized by the committee or by its chairman, is authorized and empowered to administer oaths.

8. Every department, commission, board, agency, officer and employee of the State Government, including the Legislative Counsel, the Attorney General and their subordinates, and of any political subdivision, county, city, or public district of or in this State shall furnish the committee any subcommittee, upon request, any and all such assistance, and information, records and documents as the committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created.

9. The committee, or a subcommittee or the chairman when authorized by a majority vote of the entire committee may meet outside the State with similar committees of Congress or of the several states.

10. The sum of thirty thousand dollars, or as much thereof as may be necessary, is hereby made

available from the Contingent Fund of the Senate for the expenses of the committee and its members and for any charges, expenses or claims it may incur under this resolution, to be paid from said Contingent Fund, and disbursed, after certification by the chairman of the committee, upon warrants drawn by the State Controller upon the State Treasurer.

Resolution read as Amended.

The roll was called and the resolution adopted by the following vote:

Ayes: Senators Breed, Burns, Busch, Crittenden, Cunningham, Desmond, Donnelly, Gordon, Hulse, Judah, Keating, Kraft, Mayo, McBride, McCormack, O'Gara, Parkman, Quinn, Rich, Slater, Sutton, Ward, Watson, Weybret, and Williams—25.

Noes: Senators Carter, Collier and Jesperson—3.

Adopted June 20, 1947.

EXHIBIT "B"

The Following Statement of William Patrick Brandhove Constitutes a Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities. (The Tenney Committee):

I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an

instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947; and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end.

My charges are supported by the following sequence of events:

1. In 1947, months in advance of the November election, I met with R. E. Coombs, Chief Counsel of the California Senate Committee on Un-American Activities, in his room at the St. Francis Hotel, San Francisco, and told him that I was going to announce my candidacy for member of the San Francisco Board of Supervisors; that my candidacy was intended to furnish me with a platform on which to make speeches against Communism, Communist supported candidates and Communist front organizations. Mr. Coombs then suggested that in the event Franck Havenner became a candidate for Mayor of San Francisco, my campaign program would be an ideal setup for smearing him as a "Red". At that time, I like many other people, was taken in by the previous "Red" frame-ups that Committees of this kind had made against Franck Havenner, and it was in all sincerity that I agreed to brand him as a candidate of the Communists. During this interview I mentioned to Mr. Coombs that I had no campaign funds, and that I had no sources of financial support. Mr. Coombs assured me that I should have no worry on that score, that,

in his own words, "campaign funds would come to me."

2. During the course of the campaign I covered many political meetings at which Elmer Robinson was present. At each of these meetings I made my smear talk against Franck Havenner. At one meeting when I approached Mr. Robinson, he warned me that we should not be seen speaking with each other. This surprised me as I did not consider that there was any collusion between him and me. Mr. Robinson suggested that we meet privately. This we did on several occasions, one of them being at Lake Merced, where we both withdrew from a political picnic to walk unseen in a sequestered spot along the lake. Mr. Robinson told me that I was doing good work and urged me to keep up the attacks on Franck Havenner. I then told Mr. Robinson that I had no money for campaign purposes and that my car had broken down.

3. Mr. Robinson referred me to Warnock Walsh, a member of his campaign committee, who handed me five twenty dollar bills and assured me that more would be forthcoming. Mr. Walsh then introduced me to a member of the campaign organization who was in charge of the campaign car pool. This gentleman sent me to Monnet and Gordon, a novelty supply company, which later was the only firm to be given a concession by the city administration for selling souvenirs at the Portola Festival. They immediately made available for me a 1942

Buick, Mr. Monnet's personal car. They also paid for its storage, gas and oil.

4. Several days later, a member of Elmer Robinson's campaign committee, who had represented me legally, turned over to me $500.

5. On one occasion I mentioned to Mr. Robinson that I would be willing to undertake the organization of waterfront headquarters for him. Mr. Robinson arranged for me to meet with Supervisor Dan Gallagher, who turned against Franck Havenner, when he (Gallagher) was not accepted by the liberal forces as a candidate for Mayor. Mr. Gallagher told me that waterfront headquarters were being set up by Harry Lundberg, President of the Sea Farers International Union.

6. During the campaign I mentioned to Mr. Robinson that I needed employment as my political activities has caused some estrangement between me and my union. Mr. Robinson assured me that I would be taken care of. After election I saw him and was given a card to Mr. Maher, of the Personnel Department of the San Francisco Health Department. Mr. Maher agreed to place four of my group in his department. He also offered me a job in the Public Utilities Department. I rejected this job because I had an opportunity to go to sea.

7. Starting about October 31, 1947, approximately five days before the Mayoralty Election of November 4, 1947, the Tenney Committee started its hearing in Oakland, and a fair and careful examination of the transcript of this hearing, read

in the light of what had preceded it, could lead to no other conclusion than that the Committee was again being used as a political weapon.

I believe that this chain of events speaks for itself, and that they throw a revealing light on the political manipulation of the Tenney Committee, now asking a senate appropriation of $100,000.00.

Later, during the Congressional campaign of 1948, Mr. Havenner's stand on Marshall Aid, his repudiation of Independent Progressive Party Support, the expunging from the records of the smear made against him by the Dies Un-American Committee, caused me to re-examine his political views. I saw then that I had done him and other liberals an injustice, and my subsequent actions in the final campaign were made in atonement.

EXHIBIT "C"

Legislative Department
State of California

SUBPENA

Before the Senate Committee on Un-American Activities of the State of California

The People of the State of California Send Greetings to;

William Patrick Brandhove

You and each of you, are hereby commanded to appear before the Senate Committee on Unameri-

can Activities, Room 415, State Capitol, Sacramento, of The State of California, created by Senate Resolution No. 75, 1947 Regular legislative session, at Room 415, in the State Capitol, Sacramento, California, at 3 o'clock P.M., on Saturday, the 29th of January, 1949, as witness in an investigation by the said committee, and you are hereby commanded to bring with you the following now in your possession or under your control, to wit;

For failure so to attend you shall be liable to punishment as prescribed by law and the practice of legislative bodies.

By order of the Chairman of the said committee, this 28th day of January, 1949.

JACK B. TENNEY,
Chairman.

EXHIBIT "D"

Western Union
(Wire)

Sacramento, California
January 28, 1949.

Hon. Edmund G. Brown
District Attorney
County of San Francisco
550 Montgomery St.
San Francisco, California

William P. Brandhove Today Circulated a Signed Mimeographed Statement to Members of the Legislature Charging that the California Senate Com-

mittee on Un-American Activities Used Him "as an Instrument to Smear Congressman Frank R. Havenner as a Red When He Was a Candidate for Mayor of San Francisco in 1947." Brandhove's Sworn Affidavit in the City and County of San Francisco Under Date of December Nine, 1946 is Reproduced in the Committee's 1947 Report at Page 161, the Original of Which is in the Committee Files. Either Brandhove Told the Truth in This Affidavit or He Lied. On Behalf of the Senate Committee We Urge You to Either Immediately Charge Brandhove With Perjury or to Take the Matter Before the San Francisco Grand Jury. We Are Quite Certain That You Will Take the Necessary and Proper Steps in This Matter. Best Regards.

SENATOR JACK B. TENNEY,
Chairman.

SENATOR HUGH M. BURNS,
Vice-Chairman.

Senate Fact-Finding Committee On Un-American Activities in California.

Charge Senate Account, J. A. Beek, Secretary of the Senate.

EXHIBIT "E"

Western Union

(Wire)

Sacramento, California
January 28, 1949.

Hon. J. Frank Coakley
District Attorney
Alameda County
Oakland, California

William P. Brandhove Today Circulated a Signed Mimeographed Statement to Members of the Legislature Charging that the California Senate Committee on Un-Amercian Activities Used Him "as an Instrument to Smear Congressman Frank R. Havenner as a Red When He Was a Candidate for Mayor of San Francisco in 1947." Brandhove Testified Before the Senate Committee in Oakland On or About November 4, 1947. Either He Told the Truth or He Lied. On Behalf of the Senate Committee We Urge You to Charge Brandhove With Perjury or Have the Entire Matter Presented to the Alameda Grand Jury. We Are Quite Certain That You Will Be As Desirous of Vigorous Action in This Case as Are the Members of the Committee. Best Regards.

SENATOR JACK B. TENNEY,
Chairman.
SENATOR HUGH M. BURNS,
Vice-Chairman.
Senate Fact-Finding Committee On Un-American Activities in California.

Charge Senate Account, J. A. Beek, Secretary of the Senate.

EXHIBIT "F"

Senate of the State of California Before the California Senate Fact Finding Committee on Un-American Activities.

Proceedings had and testimony taken before the California State Senate Fact Finding Committee on Un-American Activities in Open Meeting at the State of California Capitol Building, Room 415, Sacramento California, on Saturday, the twenty-ninth day of January, 1949.

Present:

Hon. Jack B. Tenney, Los Angeles, Chairman
Hon. Hugh M. Burns, Fresno, Vice-Chairman.
Hon. Nelson S. Dilworth, Riverside.
Hon. Fred H. Kraft, San Diego
Hon. Louis G. Sutton, Colusa
Hon. Clyde A. Watson, Orange.
Members of the State Senate Fact Finding Committee on Un-American Activities.

Appearances;

Francis J. O'Shea, Assistant Attorney General of the State of California, Counsel for the Committee.

Angus Morrison, Esq., Legislative Counsel of the California State Legislature.

Mr. Murray Straves, Executive Secretary of the Committee

Mrs. Linnie Tenney, Secretary of the Committee
Martin A. Jarvis, Esq.,
1002 De Young Building,
San Francisco, California

Appearing on behalf of William Patrick Maher Brandhove

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Proceedings

Chairman Tenney: For the purposes of the record, the Senate Committee on Un-American Activities is seated today and has present: Senator Hugh M. Burns of Fresno, Vice-Chairman; Senator Nelson S. Dilworth, of Riverside; Senator Louis G. Sutton of Colusa; and the Chairman, Jack B. Tenney, of Los Angeles.

Also sitting with us is J. Francis O'Shea, Assistant Attorney General of the State of California, and Mr. Angus Morrison of the Legislative Council's Bureau.

I beg your pardon, Senator. Senator Fred H.

Kraft of San Diego should be included among the members of the Committee.

Also we have Mr. Murray Stravers, Executive Secretary of the Committee and Mrs. Linnie Tenney, Secretary of the Committee.

Now, Mr. Brandhove, will you come forward and be sworn?

WILLIAM PATRICK MAHER BRANDHOVE called as a witness being first duly sworn, was examined and testified as follows:

Examination

By Chairman Tenney:

Q. State your full name, please.

A. William Patrick Maher Brandhove.

Q. Where do you reside, Mr. Brandhove?

A. 2418 Forty-fifth Avenue, San Francisco, California.

Q. What is your occupation?

A. Mariner, merchant mariner.

Q. Where did you reside in 1946, in December?

A. Mr. Tenney, I am represented here with counsel, Mr. Martin Jarvis of San Francisco, and I would like to act under his advice.

Q. You wish to confer with Mr. Jarvis?

Mr. Jarvis: May it please the Committee and Mr. Chairman, we object, at this time, to any further questions being propounded by this Committee to this witness on the ground that the purpose of such questions has not been disclosed to Mr. Brandhove

and the same are not for legislative purposes, not in the aid of legislative purposes or for the aid of the Legislature, and as foundation for such objection——

Chairman Tenney: One second, if I may, Mr. Jarvis. You are practicing law where?

Mr. Jarvis: San Francisco, Mr. Chairman, 1002 De Young Building.

Chairman Tenney: Are you associated with anyone?

Mr. Jarvis: No, I am not.

In that regard, Mr. Chairman, we have certain charges brought against this Committee and a sworn statement of such charges has been made. As a foundation for our objection, we will read the following statement of William Patrick Brandhove. The following statement of Mr. Brandhove constitutes a protest against a renewed appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)——

Chairman Tenney: Just a second, Mr. Jarvis. The Committee has received a copy of that.

Mr. Jarvis: This is a sworn copy, if the Committee please, and we ask to file it at this time.

Chairman Tenney: You have a sworn copy?

Mr. Jarvis: Yes, Mr. Chairman. May it appear of record that a sworn copy of said statement has been filed with the Committee at this time?

Chairman Tenney: Do you now, Mr. Brandhove, swear under oath, testifying under oath, that you made this copy and signed it and are acquainted with the matters in it?

Mr. Jarvis: In that regard, the statement is a sworn affidavit and speaks for itself, Mr. Chairman.

Our objections are on the following grounds: Objections of William Patrick Brandhove to answering questions before the Tenney Committee, January 29, 1949.

1. We object to answering questions by the Tenney Committee on ground that the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation.

Chairman Tenney: Just a second, Mr. Jarvis, this has not been signed.

Mr. Jarvis: I am sorry, Mr. Chairman, here is a signed statement. That is a copy we gave you.

Objections of William P. Brandhove to answering questions before the Tenney Committee, January 29, 1949.

1. We object to answering questions by the Tenney Committee on the ground that the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation.

2. Mr. Brandhove has reason to believe, and offers to prove, that the only reason he has been subpoenaed to appear before this committee is because of charges made by him in a sworn statement entitled, "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)", and that questions on such subject are not for a

legislative purpose and are in excess of the jurisdiction of this Committee.

3. We charge that the Tenney Committee has been and is now at this hearing engaged in a political and not a legislative investigation in attempting to acquit itself of the charges made by Mr. Brandhove in his sworn statement on file with this Committee, and in this regard, we demand that a joint committee of the Assembly and Senate be constituted to investigate said charges that this Committee has not and is not now acting for a proper legislative purpose.

4. We charge that the Tenney Committee cannot, under elementary principles of law, act as judge and accused; that the Tenney Committee is not and cannot be a fair and impartial tribunal for the purpose of investigating its own non-legislative functions and that a joint committee of the Assembly and Senate, excluding the members of the Tenney Committee is the only proper body to investigate such charges.

5. That at no time has Mr. Brandhove refused to testify before the Tenney Committee and that the Committee itself, including its chief counsel, Mr. R. E. Coombs, has vouched for his veracity by their releases and reports in the past.

6. That the Tenney Committee's good faith is performing a legislative function is open to serious public question as evidenced by the charges of Mr. Brandhove, and of Assembly Concurrent Resolution No. 6 introduced by Messrs. Elliot, Hawkins, Con-

don and Lewis in the Legislature, to which reference is hereby made and a copy of same filed with this Committee and incorporated herein, in that prior to questioning Mr. Brandhove an investigation of un-American activities of the Tenney Committee must first be had to establish or refute such charges.

Chairman Tenney: Those objections are overruled, Mr. Jarvis.

Mr. Jarvis: I instruct the witness, Mr. Chairman, not to answer any further questions on those grounds.

Chairman Tenney: Those grounds are overruled and the objections are overruled and the witness will be directed to answer the questions.

Q. Mr. Brandhove, where were you residing in December, 1949?

A. I refuse to answer on advice of counsel.

Q. Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?.

A. On advice of Counscl, I will not, no, sir.

Chairman Tenney: What is the feeling of the Committee?

Senator Dilworth: I feel the witness is in contempt of the Committee and the proper method of dealing with this matter is in the courts.

Chairman Tenney: I will call on Mr. O'Shea of the Attorney General's office.

Mr. O'Shea: It is my opinion, Mr. Chairman, that just as a matter of law, without taking into consideration any of the merits or demerits of the case,

that all of the specific questions which the Committee desires to ask the witness should be propounded to him, and if he desires to answer some of them he may do so, and if he refuses to answer others by reason of a refusal to answer any question, he should be given that opportunity.

Chairman Tenney: Mr. Morrison?

Mr. Morrison: I would suggest rather than taking up the time of the Committee and time of counsel and all parties concerned by going through numerous questions that he be asked, and if he refused to answer, he then be asked if he intends to refuse to answer all other questions. I think when his conduct clearly establishes that he has no intention and will not answer any questions propounded to him, no matter what it may be, on grounds stated, that it then becomes a matter of law and can be tested in the courts. I don't think it is necessary to go through each question.

Mr. O'Shea: I don't think all of them, but at least a dozen questions. He has only been asked, so far where he resides. I think fifteen or twenty pertinent questions should be asked of him.

Chairman Tenney: I believe it would be a good idea for Mr. Morrison to read for Mr. Brandhove and his counsel the law on the subject.

Mr. Morrison: I will read first Section 9410 of the Government Code, which states:

"A person sworn and examined before the Senate or Assembly or any committee cannot be held to answer criminally or be subject to any penalty or

forfeiture for any fact or act touching that which he is required to testify. Any statement made or paper produced by such witness is not competent in evidence in any criminal proceedings against the witness. The witness cannot refuse to testify to any fact or to produce any paper upon which he is examined for the reason that his testimony or the production of the paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution or punishment for perjury committeed by him on examination."

Section 9112 of the Same Government Code provides:

"Every person who being summoned to attend as a witness before the Senate, Assembly or any committee refuses or neglects without lawful excuse to attend pursuant to such summons, and every person who being present before the Senate, Assembly or a Committee, wilfully refused to be sworn, to answer any material and proper question, or to produce upon reasonable notice any material and proper books is guilty of a misdemeanor."

Mr. Jarvis: In that regard, may I read the Supreme ruling of the land on the subject?

Chairman Tenney: That is a matter for the Court, Mr. Jarvis. I don't think we will go into that here.

Mr. Jarvis: I would like to cite the case of Jones vs. Security Corporation——

Chairman Tenney: Mr. Sergeant-at-Arms, will you help the attorney, please?

We will proceed with the questions, and you may either answer them or not and the Committee will direct you to so answer the questions.

Q. Were you employed by the United States Army Transport Service as Chief Steward at any time?

A. I refuse to answer on advice of counsel.

Q. Were you living at 1831 Twenty-first Avenue in the City of San Francisco in December of 1946?

A. I refuse to answer upon the advice of counsel.

Q. Your objections here, Mr. Brandhove, are based on the grounds your counsel has propounded to the Committee? A. Yes, sir.

Q. And that is going to be the grounds, on which you object to answering every question?

A. I refuse to answer on advice of counsel.

Q. Will you refuse to answer every question that is propounded to you here today, Mr. Brandhove?

Mr. Jarvis: Mr. Chairman, in that regard, the objections have been written out and a copy has been presented to the Committee, and the objections are to answering any question based upon the grounds stated in those written objections on file with the Committee.

Q. (By Chairman Tenney): Now, Mr. Brandhove, will you state your objections so that we will have them in the record, please?

A. I object to answering questions by the Tenney Committee on the ground that the purpose of

such questions has not been disclosed to me and the same are not for a legislative purpose or in aid of legislation.

2. Mr. Brandhove has reason to believe, and offers to prove, that the only reason he has been subpoenaed to appear before this Committee——

Q. I want your objections in your own words, Mr. Brandhove, first person; I do not care what your attorney says.

A. I have reason to believe, and offer to prove, that the only reason I have been subpoenaed to appear before this Committee is because of charges made by me in a sworn statement entitled, "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)" and that questions on such subjects are not for a legislative purpose and are in excess of the jurisdiction of this Committee.

3. I charge that the Tenney Committee has been and is now at this hearing engaged in a political and not a legislative investigation in attempting to acquit itself of the charges made by me in my sworn statement on file with this Committee, and in this regard, I demand that a joint Committee of the Assembly and Senate be constituted to investigate said charges that this Committee has not and is not now acting for a proper legislative purpose.

Q. What we are asking for, Mr. Brandhove, are your objections and the grounds upon which you

make those objections to answering questions propounded to you by this Committee.

A. Those are a part of my objections.

Q. Let's have the objections and not your demands.

A. I charge that the Tenney Committee cannot, under elementary principles of law, act as judge and accused; that the Tenney Committee is not and cannot be a fair and impartial tribunal for the purpose of investigating its own non-legislative functions, and that a joint committee of the Assembly and Senate, excluding the members of the Tenney Committee, is the only proper body to investigate such charges.

Q. Again, I want your objections and not your charges.

A. That is a part of my objection, Senator, and I really believe I have my right to read them. You asked me for them.

Q. Go ahead.

A. 5. That at no time have I refused to testify before the Tenney Committee and that the Committee itself, including its chief counsel, Mr. R. B. Coombs, has vouched for my veracity by their releases and reports in the past.

6. That the Tenney Committee's good faith in performing a legislative function is open to serious public question as evidenced by the charges of myself and of Assembly Concurrent Resolution No. 6 introduced by Messrs. Elliot, Hawkins, Condon and Lewis in the Legislature, to which reference is

hereby made and a copy of same filed with this Committee and incorporated herein, in that prior to questioning Mr. Brandhove an investigation of un-American activities of the Tenney Committee must first be had to establish or refute such charges.

Q. Now, do you refuse to answer any questions that will be propounded?

Mr. Jarvis: I would like first to offer Assembly Resolution No. 6, Mr. Chairman.

Chairman Tenney: I think we are familiar with it.

Mr. Jarvis: May it appear of record that the same has been filed as a part of the record?

Chairman Tenney: We are familiar with it and the fact it was offered by a functionary of the Communist Party by the name of Hall in Los Angeles and Assemblyman Elliot.

Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?

A. I refuse to answer any and all questions on advice of counsel.

Q. Do you know Mr. Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Harry Bridges?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Louis Goldblat?

A. I refuse to answer on advice of counsel.

Q. Do you know David Jenkins?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with John Wiley?
A. I refuse to answer on advice of counsel.
Q. Are you acquainted with Oleta O'Connor Yates?
A. I refuse to answer on advice of counsel.
Q. Do you know Paul Schnur?
A. I refuse to answer on advice of counsel.
Q. Do you know Sestolv Ward?
A. I refuse to answer on advice of counsel.
Q. Do you know Dick Linden?
A. I refuse to answer on advice of counsel.
Q. Do you know David Hedley?
A. I refuse to answer on advice of counsel.
Q. Do you know Revels Clayton?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. Mervyn Rathborne?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. Walter Stack?
A. I refuse to answer on advice of counsel.
Q. Do you know Blacky Quadros?
A. I refuse to answer on advice of counsel.
Q. Do you know Molly K. Spolmack?
A. I refuse to answer on advice of counsel.
Q. Do you know Elaine Sexton?
A. I refuse to answer on advice of counsel.
Q. Do you know Mary Lake?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. R. E. Combs?
A. I refuse to answer on advice of counsel.
Q. Do you know Hugh Bryson?

A. I refuse to answer on advice of counsel.

Q. Do you know Nathan Jacobsen?

A. I refuse to answer on advice of counsel.

Q. Do you know Irving Dvorin?

A. I refuse to answer on advice of counsel.

Q. Do you know Scotty Sneddon?

A. I refuse to answer on advice of counsel.

Q. Do you know Joseph Harris?

A. I refuse to answer on advice of counsel.

Q. Do you know James Kiernan?

A. I refuse to answer on advice of counsel.

Q. Do you know Frank Havenner?

A. I refuse to answer on advice of counsel.

Q. Calling your attention to February of 1945, did you discuss affiliation with the Communist Party with anyone?

A. I refuse to answer on advice of counsel.

Q. In February of 1945, did two men by the name of McCormick and Bryson agree to recommend you to membership in the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Were you invited to a dinner by Frank McCormick at the home of Henry Fisher in San Francisco?

A. I refuse to answer on advice of counsel.

Q. Did you attend a dinner in San Francisco on or about February 1945 at which time was present Richard Gladstein, Walter Stack, Mrs. Stack and Mrs. Gladstein and Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Have you ever beer, Mr. Brandhove, a member of the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Are you now a member of the Communist Party, Hr. Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis: Mr. Chairman, we have some more signed copies of the objections.

Chairman Tenney: We would be glad to have them.

Q. Referring to the affidavit that your counsel has presented to the Committee, is that your signature, William Patrick Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis: In that regard, Mr. Chairman, the signature is before a Notary and the fact that the Notary is a Notary is a matter for judicial recognition.

Chairman Tenney: Is that your signature, William P. Brandhove?

Q. Did you take this affidavit before a Notary and have it notarized? A. Yes, I did.

Q. And that was on the twenty-ninth of January, 1949? A. This morning.

Q. Did you sign the affidavit in the presence of the Notary? A. Yes, I did, in his office.

Q. That is Mr. R. M. Stillane?

A. Yes, sir.

Q. Are you acquainted with Assemblyman George Collins?

A. I refuse to answer on advice of counsel.

Q. Were you a guest of Mr. Collins in the Assembly yesterday?

A. I refuse to answer on advice of counsel.

Q. Were you with Mr. Collins in the Assembly today?

A. I refuse to answer on advice of counsel.

Q. Are you a friend of William Snyderland, the secretary of the Communist Party in California?

A. I refuse to answer on advice of counsel.

Vice Chairman Burns: Mr. Chairman, and members of the Committee, I move that the Committee hold the witness in contempt of this committee on this date, and that counsel be instructed to prepare the necessary complaint and have it filed against him in the proper court of Sacramento.

Senator Dilworth: I second the motion.

Chairman Tenney: The motion is that counsel for the Committee be instructed to prepare the necessary complaints and follow the necessary procedure to bring this witness before the courts in Sacramento for contempt of this Committee. Who seconded the motion?

Senator Dilworth: I did.

Chairman Tenney: Seconded by Senator Dilworth. All in favor will signify by saying "Aye." Contrary minded?

(This motion was carried unanimously.)

Chairman Tenney: For the record, it should be stated that attention is called to the affidavit of William Patrick Brandhove of December 9, 1946, which appears in the Committee's 1947 report, and

of which the original copy is in the files of the Committee, subscribed and sworn to on the ninth day of December, 1946, before Ella Cook Kelly, a Notary Public in the City of San Francisco, in which affidavit, among other things, Mr. Brandhove admits being a former member of the Communist Party and specifically that he was induced to become a member of the Communist Party by Frank McCormick and Hugh Brysen in San Francisco; that after joining the Communist Party he carried out Communist activities and so forth.

He appeared before this present Committee in Oakland on November 4—the Committee sat there beginning November 3, 4, 5 and 6, instead of the thirty-first of August as alleged in the affidavit now filed with the Committee by Mr. Brandhove—and he testified on the fourth.

He testified rather fully in reference to a number of matters, and at that time Mr. Gladstein, the attorney for the Communist Party, did present to this Committee an affidavit made by Mr. Brandhove to the effect that the testimony given by Mr. Brandhove on other occasions was false and Brandhove testified he had been offered $5,000 to make that particular affidavit.

The testimony is rather voluminous and it is here before the Committee.

Mr. Brandhove has a criminal record; He was charged with sodomy in Jersey City on October 27, 1930; on October 3, 1935, grand theft; and went to Preston School of Industry; May 5, 1940, in Ork-

land, sentenced to $25.00 or five days for a violation of the California Motor Vehicle Code; April 7, 1942, wanted for grand theft and burglary in San Jose, California; March 17, 1946, San Francisco, malicious mischief at 1255 Kearney Street, San Francisco; November 26, 1946, San Francisco, violation of the Penal Code for defrauding an innkeeper; a felony warrant for his arrest charging grand theft, Section 503 of the Vehicle Code, was canceled in Los Angeles because the victim could not be located on March 3, 1947.

An affidavit allegedly signed by William Patrick Brandhove on October 24, 1948, and distributed in the City of San Francisco, is also before the Committee, containing certain allegations.

Mr. Brandhove made certain other affidavits in behalf of or for Congressman Frank Havenner, which were introduced in the Congressional Record of January 17 of this year.

Senator Dilworth: Introduced by Whom?

Chairman Tenney: Introduced by Frank Havenner, the Congressman himself.

The San Francisco News carried that story and a part of the allegation in that particular story referred to William Mailliard and Don Nicholsen of San Francisco, and Mr. Nicholsen made a statement to the press which was published in the San Francisco News of January 17, 1949, which reads as follows:

"Don Nicholsen, William Mailliard's hired cam-

paign manager, said today he would 'welcome a congressional investigation as demanded by Mr. Havenner. Mr. Havenner has twice been re-elected through trick and device on the part of his supporters, and an opportunity to demonstrate that would be appreciated. The Brandhove affidavit is a tissue of lies and can be so proven.' "

Mr. Brandhove, I would like to have you answer one additional question. Just stand up, please. It won't be necessary for you to come up here.

Q. Are you acquainted with Congressman Franck Havenner's secretary?

A. I refuse to answer on the advice of counsel.

Q. On the grounds heretofore mentioned?

A. That is correct.

Q. One other question, Mr. Brandhove. Does the Army Transport Service in San Francisco have a record of your activities?

A. I refuse to answer on the advice of counsel.

Chairman Tenney: Very well; that is all.

Now, I wonder if the Mayor of the City of San Francisco, Mr. Elmer Robinson, is present?

Mayor Robinson: I am present and I would like to make a statement. I would like to make a statement first before being sworn and then if the Committee would like me sworn I am perfectly willing to be sworn.

Yesterday there was called to my attention a document that had been circulated among some of the legislators here in the State Capitol at Sacramento. I communicated with the chairman of this Commit-

tee, Senator Tenney. He talked with me on the telephone, and he acquainted me generally with the context of the pamphlet, and I expressed my desire to be here present today to challenge the statements set forth in that statement.

I ordinarily would refrain from dignifying such statements as are contained in the document, but when any man sees fit to come before a Committee of the State Senate and present such a document to which he has affixed his signature and state that he has sworn to it before a Notary Public, I desire the opportunity to testify at whatever time this Committee may determine with reference to all of the matters and things therein contained, wherein reference may be made to me either directly or indirectly.

The document contains inferences and innuendoes that are premised entirely on falsehoods, untruths, part truths and pure fiction.

I ask of this Committee the opportunity to be present and be sworn as a witness to testify completely with reference to all mention of me in that document.

Now, if the Committee desires it today I am prepared to be sworn today. If it is the wish of the Committee to defer hearing my testimony until such time as the witness Brandhove has been examined, I shall abide your wishes in that regard, of course.

Chairman Tenney: Will you be seated, Mayor Robinson? I would like to say this to the Committee: We now have this declaration by Mr. Brandhove under oath which is before the Com-

mittee and it no longer has the status it had yesterday when it was distributed to the members of the Legislature. I believe what Mayor Robinson says is true, I did speak to him yesterday on the telephone and acquainted him with the charges that are made in this document and told him I thought perhaps it would be well to have these things cleared up immediately, and in view of the fact, however, that Mr. Brandhove has refused to substantiate any of these things under oath before the Committee, it may be the status of the entire situation is changed.

What is the feeling of the Committee? Do you think we should take Mr. Robinson now or at a later date? I believe there will be nothing lost taking his testimony today.

Mayor Robinson: The facts will be the facts at any time you see fit to hear my testimony.

Chairman Tenney: I believe, Members of the Committee, and Mayor Robinson, as long as you have taken the trouble to be here today voluntarily and to give such testimony as the Committee requires, it would be best to proceed to examine you in reference to the matters to this document. If the Committee has no objection, we will do that.

Mr. Jarvis: Mr. Chairman, we object on the ground that the Committee has no jurisdiction to take this testimony.

Chairman Tenney: You have no right to object, Mr. Jarvis. You are representing Mr. Brandhove. You are not representing Mayor Robinson.

Mr. Jarvis: May I make my objection on the record?

Chairman Tenney: You may not.

Mr. Jarvis: On the ground it is for purposes of political activities rather than legislative purposes?

Chairman Tenney: You are not representing Mr. Robinson, to the best of my knowledge—Is he, Mr. Robinson?

Mayor Robinson: He certainly is not. I might point out to you that this gentleman has already participated in the hearing by offering evidence, and I feel, as a citizen, I am entitled to the right to refute that evidence at any time this Committee is willing to hear me. The hearing is on; this man has submitted evidence, he calls it evidence, and offers it in the record, and I demand the right to refute the statements contained in that document.

Chairman Tenney: We will go into that immediately, Mayor Robinson. However, I think before we do that I wonder if Mr. Jarvis would come forward and be sworn.

Senator Dilworth: Will you swear Mr. Jarvis?

MARVIN A. JARVIS

called as a witness, being first duly sworn, was examined and testified:

Examination

By Chairman Tenney:

Q. State your full name, for the record.

A. Marvin A. Jarvis.

Q. Where do you reside?

A. 500 Hyde Street, San Francisco.

Q. Where is your law office?

A. 1002 De Young Building, San Francisco.

Q. You are there alone? A. I am, sir.

Q. When were you admitted to the Bar in the State of California? A. 1947.

Q. Now, did Mr. Brandhove employ you for the purpose of representing him here in Sacramento?

A. He did.

Q. Is Mr. Brandhove paying you a fee for that matter? A. He will, yes.

Q. Have you had any retainer from him?

A. No.

Q. Are you acquainted with Mr. Franck Havenner? A. I am.

Q. How long have you known Mr. Havenner?

A. Since the Congressional elections.

Q. Of last year? A. Of last year.

Q. Where did you take your law studies?

A. Stanford University.

Q. Are you acquainted with Mr. Richard Gladstein? A. Professionally, yes.

Q. Mr. Aubrey Grossman? A. No.

Q. Professionally? A. No.

Q. Do you know who he is? A. No.

Q. Do you know Mr. Jenkins of the California Labor School? A. No.

Q. You have never met him? A. No, sir.

Q. Are you acquainted with Mr. Havenner's secretary? A. I am not.

Q. You have never met her? A. No, sir.

Q. When did you last talk to Mr. Havenner?

A. At a political meeting, three or four days before the election for Congress of last year.

Q. When did you last talk to him on the telephone? A. I never have.

Q. Are you acquainted with Mr. Elliot, an Assemblyman? A. I just met the gentleman.

Q. Are you acquainted with Mr. George Collins?

A. I am, professionally.

Q. How long have you known him?

A. Approximately two and a half years, casually. He represented a defendant in a case where I represented the plaintiff—Pardon me, it was just the other way around, he represented the plaintiff in a case where I represented the defendant.

Chairman Tenney: I think that is all, Mr. Jarvis.

Senator Dilworth: Will you swear Mayor Robinson?

ELMER ROBINSON

called as a witness, being first duly sworn, was examined and testified as follows:

Examination

By Chairman Tenney:

Q. Now, Mr. Mayor, would you be kind enough to give your name for the record?

A. Elmer Robinson; I live at 2100 Pacific Avenue, San Francisco, California.

Q. You are presently the Mayor of the City and County of San Francisco? A. I am.

Q. When were you elected to that office?

A. The November election of 1947.

Q. Do you recall, Mr. Mayor, the date of that election? A. November fourth, as I recall.

Q. I mention that because Mr. Brandhove's sworn affidavit alleges that the Committee on Un-American Activities started its hearings on October 31, 1947, approximately five days before the mayoralty election of November 4, 1947, in Oakland. The record shows, as a matter of public record, the Committee opened the hearings in Oakland on the third of November, and Mr. Brandhove testified on the fourth, which more or less makes Mr. Brandhove a liar by his own testimony on the public record.

Q. Have you ever met Mr. Brandhove?

A. A number of times.

Q. Can you tell us approximately the first time you met Mr. Brandhove?

A. Well, like most candidates for public office, I had to file within the time provided by law. I believe the last day for filing was sometime in September of 1947, the exact date I do not have in mind because I filed at 9:00 o'clock on the morning of the first day and started campaigning actively by visiting meetings from that time forward until election day. There were a great number of candidates who filed for public office in San Francisco at that election and among them was a man named—who gave his name as William Patrick Brandhove, a candidate for supervisor. There were four candidates for the office of mayor and there

were quite a number for the office of supervisor, I have forgotten just how *man,* because I was more concerned with the number running for the office of Mayor.

Now, I had better answer your question, Mr. Senator, like all candidates I covered every possible meeting, I spoke at breakfasts, luncheons, dinners and I went through department stores, spoke at factories, and every place where two or more people would stand still and listen I talked for Robinson for mayor and I covered all night meetings I could get a list of.

The candidates for mayor, there were three major candidates, one fellow who had somewhat less strength, but the three main candidates maintained headquarters, had staffs working for us, and, naturally, had a list of all meetings in San Francisco and, as a matter of fact, our offices even exchanged lists of meetings, and supervisors, having less staffs, would very often call our headquarters and ask for the various lists of meetings which were given to us each morning for the day and each night for the night, and I covered all I possibly could, sometimes as many as ten or eleven in one night and some nights only two, three or four, depending on how many gatherings there were made available to us, and, sometime, I would say, during the middle of September, now, this is an estimate, because I wasn't thinking of my own campaign—but my

recollection would be about the middle of September, maybe a week, more or less, one way or the other, one night there were three cars, maybe four fellows to the car, riding in my particular caravan, the other candidates had about the same, and I am riding along the street and we had occasion to stop and wait for some reason, I have forgotten what it was, and we heard a loud speaker blasting to beat the band a block away, and, figuring that it might be one of my opponents, I became concerned, and I caused an investigation to be made.

We went on our way but didn't catch up with the loud speaker that night.

On the next night we went to some meeting in the far Mission—the Mission District in San Francisco and the loud speaker came blandly up to the meeting and here was a car with a loud speaker attachment on it, and lo and behold, it had pasted on its two sides large signs, "Brandhove for Supervisor" and then underneath that held with some little bumper straps were the signs, "Robinson for Mayor."

I became concerned and asked one of my boys to investigate and I don't recall for the moment who it was investigated, but I have a general idea, anyway, he reported back to me that this man was a candidate for supervisor and I said that I did not like the idea because I did not want to be involved in any supervisor's fight. Every night I had been meeting various candidates, the more

prominent ones, of course, more often because they were attending more meetings, and we would say "Hello" and might get well acquainted in six weeks time of campaigning, covering the same meetings you meet all the candidates and eventually I met Mr. Brandhove, whether I met him on the first night we identified the loud speaker or at a subsequent night, I cannot say.

Q. May I interrupt, were you running independently?

A. Yes, I was running independently as were the other candidates. There were no tickets in the campaign at all. As you know, the office is nonpartisan. We had no package, and were all running on our own, even the supervisors—although I think three supervisors were running together, but generally there were no tickets.

Senator Kraft: May I ask a question?

Chairman Tenney: Is it relevant to what he is talking about now?

Senator Kraft: No, I will skip it.

Chairman Tenney: Just hold it for a moment.

A. (Continuing): As I met all the candidates, I met Mr. Brandhove. I observe, in connection with Mr. Brandhove's statement, that he met me; of course he met me, he couldn't help but meet me, because all the major candidates for the office of mayor at all meetings were asked to speak first because there were a greater number of candidates for supervisor. Then were called the incumbent

supervisors and on down the line would be the fellows who developed to be almost or also rans.

I never tarried very long at these meetings, after I made my talk I was off to the next one, and in spite of what Mr. Brandhove says in his statement I never heard him make a speech. One night I did walk into a place when he was just completing his speech, and he was walking out as I walked in, and that is the nearest I ever came to hearing Mr. Brandhove make any speech.

Chairman Tenney: All of this was between the dates of what?

A. I would say the middle of September and fourth of November.

Q. Now, did Mr. Brandhove at any time, or did you say to Mr. Brandhove at any time that he should not be seen talking with you or that you should be not seen speaking together?

A. No, that is absolutely untrue, false and untrue.

Q. Did you ever suggest to Mr. Brandhove that you meet with him privately?

A. No, I did not.

Q. Was there ever any conversation at all that could remotely be connected with such a suggestion on your part?

A. No, quite the contrary. There were two things that would account for that; one is I did not want to be associated with any candidate for supervisor because I was seeking the support of all the

people, and I did not want to be tied with any other candidate for supervisor, and, likewise, the other candidates were in the same position, they were remaining aloof from candidates for supervisor.

In addition to that, the only time Mr. Brandhove ever spoke to me, and he did approach me at different times and expressed himself in the presence of a number of people, that he was broke, that he didn't know whether he was going to be able to continue his campaign and he very patently hinted a few times that a couple of dollars would help him along and, later, I will point out a time when he very directly asked me for some money, and that is in paragraph 2 and just right along with the subject I am discussing.

Q. Let us take it along gradually, if you will.

A. Yes.

Q. Incidentally, did you ever have a conversation with me, the chairman of this committee, at any time during your campaign for the office of Mayor of the City of San Francisco?

A. Never a word. If I had seen you I would have talked to you, but I didn't see you.

Q. That is right. Did you talk to any of these senators, members of this Committee, in reference to your candidacy? A. Not a one.

Q. Was there ever any understanding between you and myself or the members of this Committee that we were to assist your campaign by smearing any other candidate?

A. There was never any conversation at all. I never met up with any one of you at that time. You were pretty scarce, I don't know why, but you were not around San Francisco, and I was busy.

Q. We had other campaigns, Mr. Mayor.

Now, Mr. Brandhove makes this statement, first he says:

"Mr. Robinson suggested that we meet privately." You have categorically denied that, and then he says, "This we did on several occasions, one of them being at Lake Merced, where we both withdrew from a political picnic to walk unseen in a sequestered spot along the lake. Mr. Robinson told me that I was doing good work and urged me to keep up the attacks on Franck Havenner. I then told Mr. Robinson that I had no money for campaign purposes and that my car had broken down."

Will you tell the Committee what the situation is, if any, in that allegation?

A. Mr. Brandhove, on the occasion he did speak in my presence, was telling what he was going to do to the Communists down on the waterfront; how he was going to fight them alone, singlehanded, was going to carry the world, and he had a great number down on the waterfront who were going to follow him, and he was going to do great things.

I caused an investigation to be made among some friends of mine who belong to the various waterfront unions, and I learned that Mr. Brandhove

did not have the following he pretended to have and thereafter I pretty generally discounted that he would say as we would meet from time to time, and I instructed those who traveled with me in my campaign to stay away from him.

I received through the mail, at my home, an invitation to some sort of a railroad man's picnic, I don't recall which particular section of the railroad men it was, but it was to attend a picnic at Lake Merced, and being the candidate, and there being more than two people promising to be present, I went to the picnic and when I got there Mr. Brandhove was there, and one or two other gentlemen, and we waited around for the picnic to start, they had a loud speaker set up, and we waited and waited, and very few people put in an appearance, it was a pretty weak picnic, however, I made my speech over the radio, Mr. Brandhove, it seems, had already made his before I arrived, and, afterwards, Mr. Brandhove said, "I have something very important I want to say to you," and I said, "Well, let's wait until we get through." I wanted to shake hands all around with the people that were there, and we walked around and had a bottle of Coca Cola or a bottle of beer and tried to talk to everyone and get a few votes for Robinson for Mayor, and Brandhove had his cards advertising Brandhove for supervisor and I did go out thirty or forty feet with him, to the edge of the lake, and he told me he had written a book and that the book was

going to straighten out the world, and, as I recall, he gave me a copy of the book and it had a yellow paper on the cover and on the front, as I recall, it sold for a dollar a copy, but it was going to prove that there was a Communist behind every tree and behind every building and Brandhove was the man who was going to dispose of this whole program. I took the book home and that night or the next night I read a little bit of, but it was all Brandhove and his experience as a cook on a boat or something like that, and what labor had done to him, and what the Communists had done to him, and what he could do, I don't think I saved the copy of the book, I think it went in the waste basket, but whatever it was, that was the great thing, and then he said to me——

Q. This is at Lake Merced?

A. Yes. He said to me, "If I could just have some money—" He wanted to open headquarters down on the Embarcadero, and then he was going to divide all the seamen, of course he didn't know and I didn't tell him that I had a number of seamen who were advising me with reference to my campaign, and so I took it all with a grain of salt, that is what he said, but every approach for anything, just a few dollars, he was always crying that he was starving and broke, and I had a committee that handled that for me and I might have mentioned Mr. Warnock Walsh, I might have mentioned that he was the chairman of my finance com-

mittee. I may have told him that I had no money, that Mr. Walsh was the chairman of the finance committee, and that I had no money to give away anyway, I had enough to do to keep going myself.

However, that is the very secret conference that took place at Lake Merced. He wanted some money to print or distribute some more of these books, that was a part of the approach when we were out at the lake when he told me about the book that was going to settle the problems of the world. He needed some money to get out some more books, either to distribute them or to print them, I don't recall.

Q. You told him at that time that you didn't handle the money of the campaign? A. Yes.

Q. But you did refer to Mr. Walsh, who was your finance manager?

A. I told him I had no money, and that if he wanted any money that they were handling the campaign funds, I was not.

Q. Mr. Mayor, are you acquainted with the firm of Monnet and Gordon, in San Francisco?

A. Yes.

Q. Mr. Brandhove alleges in this statement of his, which is now under oath, that Mr. Walsh sent him to Monnet and Gordon, "a novelty supply company, which later was the only firm to be given a concession by the city administration for selling souvenirs at the Portola Festival. They immediately made available for me a 1942 Buick, Mr.

Monnet's personal car. They also paid for its storage, gas and oil."

A. I know nothing of that.

Q. It is generally true in most campaigns, however, that if you are promising candidate many good supporters do get together and donate cars for the use of the candidate?

A. I don't doubt that was done. My campaign was no different than any other, and I hope that my committee did as much as the other committees did, and I imagine that they did because I won the election and the polls, told me before the election that I was to be the successful candidate, and I had that information.

Q. The fourth paragraph alleges:

"Several days later, a member of Elmer Robinson's campaign committee, who had represented me legally, turned over to me $500.00."

A. I have no knowledge of such a thing.

Q. Next is the one:

"On one occasion I mentioned to Mr. Robinson that I would be willing to undertake the organization of waterfront headquarters for him. Mr. Robinson arranged for me to meet with Supervisor Dan Gallagher, who turned against Franck Havenner, when he, Gallagher, was not accepted by the liberal forces as a candidate for mayor. Mr. Gallagher told me that waterfront headquarters were being set up by Harry Lundberg, president of the Sea Farers International Union."

Have you any comment to make on that?

A. Yes, that is not true. Mr. Brandhove didn't have to meet Mr. Dan Gallagher through any recommendation from me for this reason: Mr. Walsh and fifteen other San Francisco citizens, would travel with me every night to every political meeting, and some would go ahead of me and some would remain behind me and give me the results of the meeting as to my speech after I left on what I had said or what I should say when I would get to the next meeting, and I was thoroughly briefed on every meeting, and Mr. Gallagher was one of the group, and if Mr. Brandhove attended the meetings he says he did, then Mr. Brandhove met Mr. Gallagher on his own, if he did meet him. I don't know that he did, and I have never seen them speak together.

Q. His next statement is:

"During the campaign I mentioned to Mr. Robinson that I needed employment as my political activities had caused some estrangement between me and my union." As a matter of fact, he had been expelled.

"Mr. Robinson assured me that I would be taken care of. After election I saw him and was given a card to Mr. Maher, of the Personnel Department of the San Francisco Health Department. Mr. Maher agreed to place four of my group in his department. He also offered me a job in the Public

Utilities Department. I rejected this job because I had an opportunity to go to sea."

Do you have any comment on that?

A. Well, Mr. Brandhove tells an absolute untruth there because there isn't a man, woman or child living who can honestly say that I made them any promise for any position before I was elected to the office of mayor, and you may understand, Mr. Senator, and no doubt you do, not being an amateur yourself, I have been around political life for about thirty years, and one of the elementary things a man learns is that you do not make political promises of patronage in campaigns. If that had been thirty years ago when I was a young boy, there might have been some merit to it, but a man who knows anything about seeking public office knows better, he never does it, and I never did.

Now, Mr. Brandhove did. After I became mayor some months back, he came in with two men and said that they were starving, out of work, and wanted a job. Now, anyone who knows the charter of the City and County well knows I had no jobs to give. I have three jobs only, an executive secretary, a confidential secretary and a stenographer. Beyond that, excepting my commissions and boards, all jobs are Civil Service. I have no control over them, Mr. Senator, and not so much as you have, because you might be able to change the law here, but I have no control over them at all.

We have in the mayor's office the position of

public service director and he has an assistant. When anyone comes in from the street or sent in by acquaintances, whether it be a stranger or one with whom I am acquainted, they are by me or some one in my office referred to the public service director. He, in turn, takes them down to the Civil Service Commission. They, under the law, have the right to give what is known as temporary or ninety day employment if the employment is needed in a department and there is no Civil Service list available.

Now, Mr. Brandhove and these two men who were with him were referred by me to Mr. Sullivan, and Mr. Sullivan probably, if he did what he was supposed to do and would do if any person came in to him, he took them down to the Civil Service Commission and, undoubtedly, tried to get them employment because when starving people come in or people come in and report they are starving, we try to see if they can be helped, and that is the manner and the method of doing it in San Francisco.

Whether they got employment, I don't know.

Q. I believe that about covers it.

A. There is one thing you have not covered, and, then, so far as the volunteer statement is concerned, I believe I am through.

Two things I want to say, one is I don't know Franck Havenner to be a Communist, and the second one that I want to say is I have never said to a man,

woman or child that he is a Communist. I want that in the record.

Now, it is true that Mr. Brandhove did a lot of talking, I did the listening, and the things that are set forth in this statement are what Mr. Brandhove himself might have had in his mind or might even have said, but they are not what Robinson said.

Now, there is one other point that is made in paragraph 3, which, I believe, needs clarification. Mr. Brandhove in his statement says that he went to see the firm of Monnet and Gordon. I don't recall of ever having met Mr. Gordon, but, during the campaign, I went to make one of the Robinson campaign speeches before a group called the Show Folks of America, and a man by the name of Frank Winkleman was president of it, and he told me that they complained they had not been given an opportunity to exist in San Francisco, and I told them, a committee from their group, that if I became mayor of San Francisco I would see they got fair treatment. That was the extent of my statement.

I was elected, and Mr. Monnet became the president of Show Folks of America, and he came to see me with reference to the Portola Festival in San Francisco, and I referred him to the Portola Festival Inc.

Before I became Mayor, my predecessor, Mr. Roger Lapham, pursuant to recommendations by the Board of Supervisors, appointed two commissions, one for the Centennial Observance and the

other for the Portola Festival in San Francisco. My predecessor appointed those two committees.

The Portola Festival Committee, Inc., was one of them and the Centennial Observance was the other.

After I became mayor of San Francisco I called for the two files and examined the personnel of both committees and I determined, as mayor of San Francisco, that I would not add to or strike from the committee appointments of Mayor Lapham, and I did not appoint one man to either the Portola Festival Committee or the Centennial Committee, and neither did I remove anyone, so, when Mr. Monett came to see me about the Portola Festival and reminded me of my promise that the Show Folks of America would be given a fair deal, I referred him to the president of the Portola Festival Committee, Inc., and Mr. Monnet went from me to them and carried on his negotiations.

Mr. Brandhove says in his statement that Mr. Monnet and his group, the Show Folks of America, did get some concession at the Portola Festival, but I had no participation whatever, and whatever they got was direct with the corporation voluntarily and I say that it is very unfair and unjust and an unwarranted implication thrown into this statement with reference to that matter, and it is wholly without foundation or truth.

I think that covers it.

Chairman Tenney: Do the members of the Com-

mittee have anything to ask the Mayor of San Francisco?

Senator Dilworth: Mr. Chairman.

Chairman Tenney: Senator Dilworth.

Senator Dilworth: I would like to say I consider that the Mayor has been most frank and I want to congratulate him on his Americanism, and I think he has given us all the information in his possession.

Chairman Tenney: Are there any other questions?

Mr. Robinson, is there anything you wish to add?

A. Just this one thing, I shall hold myself available to this time or place it might desire to ask me any other questions in connection with this or any other matter.

Chairman Tenney: Thank you very much, and the record will show you appeared voluntarily, and the Committee appreciates your cooperation.

There are a couple of matters, before we adjourn, I think should be inserted in this record. One of the allegations made by Mr. Brandhove in his now sworn to affidavit is that the Committee, the Senate Committee on Un-American Activities, used him as an instrument to smear Congressman Franck R. Havenner as a Red, when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck

Havenner's opponent, conspired with the Tenney Committee to this end.

Calling the Committee's attention, and for the purpose of the record, to Mr. Brandhove's testimony before the Committee in Oakland in November, we have only been able to find one reference to Congressman Havenner in Mr. Brandhove's testimony, and that is this part which appears at page 127 of the Committee transcript of the testimony at that time, which reads:

"I have proven in a little pamphlet I just published called "Communist Conspiracy on the United States Waterfronts' that since the adoption of the so-called 'democratic constitution' the party of San Francisco, did divert from the treasury of the Marine Cooks and Stewards Union, C.I.O., well over $150,000 in the space of one year.

"Question by Mr. Combs: For what purpose?

"Answer: For purposes of course, of organizing the Communist party and encouraging a lot of political opportunists, such as Gladstein and his law firm. Incidentally, while I'm on that subject, I understand that the law firm of Gladstein, Sawyer, Resner, Andersen and Edises are very powerful today, not only in the affairs of the union, but also in city government. It appears they can even have judges take days off so they wouldn't have to sit in judgment upon them in court. It's amazing the strength they have. They hire people, pay them a thousand dollars, pick money out of thin air—it's really amazing.".

Senator Dilworth: If this testimony has not been previously public I think the witness has pretty well discredited himself and the necessity to read it again is gone.

Chairman Tenney: The purpose of my reading into the record this part of his testimony is to show the only reference made in his testimony to Congressman Havenner. This allegation that he has in the affidavit that the Committee induced him and used him as a tool to smear Congressman Havenner, and this testimony was given on the day of the election, and I want it in the record to show that by his own testimony, either Mr. Brandhove was lying then or he is lying now.

(Continuing): "It's amazing the strength they have. They hire people, pay them a thousand dollars, pick money out of thin air—it's really amazing. Why, last Tuesday they donated a thousand dollars to Havenner."

That is the only reference to Congressman Havenner that we have been able to find in his testimony.

Just one other small part of the testimony that I think should be read into the record, because it shows the inconsistency, and that is the following, with appears at page 229 of the Committee's Oakland hearing, and the Chairman was asking Mr. Brandhove:

"Question by Chairman Tenney: Mr. Brandhove, may I make this suggestion: There were two points Mr. Gladstein made that require your answer. First, he charged that at the time that you

allege in your affidavit and testimony that you attended a Communist Party meeting together with himself and his wife, that first, you have never seen his wife, and secondly, at that time he was in Washington. And the second point, that you made an affidavit in which you accused Harry Lundeberg of furnishing at least part of the funds to the fight you were having against Communist Control of the Union. Now, about when was it you met Mr. and Mrs. Gladstein?.

"Answer: The first time I met Mr. and Mrs. Gladstein was at the home of Henry Fisher during the month of February.

"Question by Mr. Combs: What year?

"Answer: 1945.

"Question: Was that on the occasion of your being recruited into the Communist Party?

"Answer: There were three days before my recruitment into the Communist Party.

"Question: In your affidavit you refer to being driven, I think by Mr. and Mrs. Gladstein, to a particular place where you had a Communist Party meeting. What was the approximate date?

"Answer: I was driven on two occasions, actually, by them. On one occasion it was the St. Francis Hotel, the Italian Room and that evening Mr. Gladstein and Mr. Schneiderman——

"Question: What Schneiderman?

"Answer: William Schneiderman—gave talks that night, and the subject under discussion was the Dumbarton Oaks Conference.

"Question: Can you describe, from your recollection, Mrs. Gladstein?

"Answer: Yes, she was I should say a slight woman, blonde——

"Question: Can you recall her first name?

"Answer: Oh, God, I don't know her first name.

"Question: Was it in their automobile?

"Answer: Oh, yes.

"Question: Do you remember the type of automobile it was?

"Answer: It was a coupe, I recall, I believe a convertible.

"Question: Do you recall the make?

"Answer: No, I didn't pay any attention.

"Question: But it was a coupe?

"Answer: It was, definitely.

"Question: Therefore, it is your testimony that Mr. Gladstein's statement that he was in Washington at a particular time is not the time you referred to?

"Answer: I don't know what he referred to."

Now, we will go to page 232:

"Question: Will you tell us about the making of this affidavit, briefly?

"Answer: Oh, yes, I made it. I made two affidavits.

"Question: Briefly explain the circumstances.

"Answer: I was plagued by numerous telephone calls from Frank McCormick, who was at that time port agent of the Marine Cooks and Stewards Union. I wouldn't accept the calls at the hotel.

Then finally I accepted them, and I told them to call me again that evening. The call was early in the morning, 9:00 o'clock, I would say. I told them to call me at 5:00 o'clock. He did call at 5:00. At that time Frank McCormick told me he wanted to see me. I said what about, and he said he wanted to see me about getting me to withdraw from the rank and file group. I told him I'd think it over and see him the following day. The following day I had lunch with him at Jimmy's Place down near the Embarcadero. It's used quite frequently by the Communist clique, and he said that Gladstein wished to see me about something he had in mind. Well, I had something in mind myself. I went up to see Gladstein anyway, and had a talk with him. At that time Richard Gladstein asked me if I would sign an affidavit prepared by him and guarantee him that I would not run for office for one year, and accept from him payment of $5,000.00, mind you, if I would sign an affidavit prepared by him. I asked him what the content of that would be, and he said it would involve Harry Lundeberg, President of the Seafarers International Union of California. I said, 'How will it involve Lundeberg?' He said, 'I want you to say in that affidavit that moneys were received by your group from Lundeberg.' I told him to prepare the affidavit and I'd be back to sign it the following day. That night, together with two members of the Rank and File Publicity Committee, Kaplan and Martin Harris—

"Question: You realize you are accusing Gladstein of perjury?

"Answer: Oh, yes, I accused him in court of the same thing.

"Question: All right, continue.

"Answer: I went to the Powell Hotel where I dictated to a stenographer, stating that I would, on the following day, sign an affidavit that would be presented to me by Mr. Gladstein; that I wished to take this occasion, twenty-four hours in advance, of being on record; that I was merely signing that affidavit because it was presented to me as a threat of intimidation and coercion and an attempt to buy my will and an attempt to sway me away from my convictions against Communism. I went to Gladstein's office the following day as arranged, and signed the affidavit."

Now, is there anything more to come before the Committee?

Mr. O'Shea, will you handle the matter referred to earlier by the Committee?

Mr. O'Shea: The matter will have to be presented to the City Prosecutor, if that is what the Committee intends to do. As far as I am concerned, it is a question of law now, and whoever is going to swear to it; if you decide you want to swear out a complaint, a member of the Committee will have to sign the complaint.

Chairman Tenney: The procedure in the past—our counsel was not able to be here today because

of an infection of his face, and, for the record, I talked to him yesterday, and he had the infection lanced and had to go to the doctor today and it was impossible for him to get here, but he did say categorically and emphatically and with complete emphasis that Mr. Brandhove was a liar and nothing of any kind ever occurred as stated by Mr. Brandhove, and that he will take the stand at any time under oath for the purpose of refuting the allegation in the document distributed by Mr. Brandhove.

Mr. O'Shea: Might I suggest this: That, as you know, the normal procedure would be for some one on the Committee, if they desire to issue a complaint for a misdemeanor committed within this City, to go to the prosecutor and swear out a complaint. Some member of the committee will have to swear to the complaint.

Chairman Tenney: I will be here until Monday at about 1:00 o'clock and I will sign the complaint myself.

Mr. O'Shea: It will have to be written up and taken to the City Prosecutor and sworn to before the Magistrate.

Chairman Tenney: That will be done.

If there is nothing further the Committee will stand adjourned until the call of the Chairman.

CERTIFICATE OF OFFICIAL PHONOGRAPHIC REPORTER

State of California,
County of Sacramento—ss.

I, J. C. Dunn, hereby certify that I am an official phonographic reporter of the Superior Court of the State of California, in and for the County of Sacramento, and a competent phonographic writer.

That upon Saturday, January 29, 1949, I took down in phonographic writing all the testimony given and proceedings had before the California State Senate Fact Finding Committee on Un-American Activities in Room 415, State Capitol, Sacramento, California; that I thereafter caused my said phonographic writing to be transcribed into longhand typewriting, and that the foregoing 52 pages constitute a full, true and correct transcription of all my said phonographic writing, so taken as aforesaid, and that the foregoing 52 pages constitute a full, true, correct, accurate and verbatim transcript of all said testimony and proceedings.

Dated: Sacramento, California, January 31, 1949.

J. C. DUNN,
Official Phonographic
Reporter.

[Endorsed]: Filed March 21, 1949.

[Title of District Court and Cause.]

MOTION TO DISCUSS COMPLAINT

Now come Jack B. Tenney; the Senate Fact Finding Committee on Un-American Activities, a California legislative committee; Hugh M. Burns; Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton, and Clyde A. Watson, each for himself and not one for the other, and files this his Motion to Dismiss Complaint of plaintiff in the above-entitled action:

I.

That said complaint does not state facts sufficient to confer upon the above-entitled court jurisdiction of the subject matter of said complaint for the following reasons and in the following particulars:

(1) That the complaint in the above-entitled action does not state facts sufficient to show that Senate Resolution No. 75, June 20, 1947, is invalid under the 14th Amendment of the Constitution of the United States if read into any criminal statute for want of certainty.

(2) That no diversity of citizenship between the parties is disclosed in said complaint.

(3) That said complaint fails to state facts sufficient to disclose any substantial claim for relief arising under the laws of the United States and/or the Constitution thereof.

II.

That the complaint in the above-entitled action

does not state facts sufficient to constitute a claim upon which relief can be granted.

III.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which damages may be recovered from these defendants or either of them.

IV.

That said complaint is not a short and plain statement of the claim of plaintiff showing that the plaintiff is entitled to relief.

V.

That there is a misjoinder of causes of action in that there are joined together several causes of action in said complaint and not stated separately therein, to wit:

(1) A cause of action relating to a transaction or occurrence wherein it is claimed by plaintiff that he was deprived of certain rights in respect to circulating a petition to the Legislature of the State of California.

(2) A cause of action where it is claimed that plaintiff was deprived of certain rights in respect to being subpoenaed to appear before the Tenney Committee.

(3) A cause of action based upon a claim that plaintiff was deprived of certain rights in respect

to his appearance and the conduct of defendants, Jack B. Tenney, the Senate Fact Finding Committee on Un-American Activities, a California legislative committee, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson, at a hearing before the Tenney Committee.

(4) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to the filing of a complaint in the Municipal Court of the City of Sacramento.

(5) A cause of action wherein it is claimed that plaintiff was deprived of certain rights by reason of a claimed invalidity of the resolution creating the Tenney Committee.

(6) A cause of action wherein it is claimed that plaintiff was deprived of certain rights pertaining to due process of law.

(7) A cause of action wherein it is claimed that plaintiff was deprived of equal protection of the laws.

(8) A cause of action wherein it is claimed that plaintiff was deprived of the right of free speech.

(9) A cause of action wherein it is claimed that plaintiff was deprived of his rights to petition the Legislature for redress of grievances.

(10) Plaintiff attempts to allege a cause of action against the defendants collectively and indi-

vidually with a cause of action based on the claim that a conspiracy existed between them.

VI.

That said complaint is uncertain in that it does not appear therein nor can it be ascertained therefrom how or in what manner or by what means:

(A) Why the subpoena referred to in Paragraph 3 of the complaint should, or what authority in law required it to, state the purpose or object of said hearing or to refer to or state the purpose or object of plaintiff's required testimony thereat, as alleged in said paragraph.

(B) Any of the matters referred to in Paragraph 4 of said complaint could or have in any manner affected any legal or constitutional right, privilege or immunity of plaintiff.

(C) The appearance of Elmer E. Robinson as a voluntary witness and denying the truth of the charges set forth in plaintiff's so-called petition could in any manner thwart the charges contained in said petition and defeat the purpose stated in said petition.

(D) The sending of either or any of the telegrams referred to in Paragraph 5 of said complaint could in any manner deprive or subject plaintiff to the deprivation of any rights, privileges or immunities secured by the Constitution and laws as set forth in Section 43, Title 8, USCA, or of the

equal protection of the laws or of equal privileges or immunities under the laws as provided for in Section 47, Subdivision 3, Title 8, USCA.

(E) Any act alleged in Paragraph 6 of said complaint could deprive plaintiff of any rights as set forth in the preceding subdivision.

(F) Any act alleged in Paragraph 7 of said complaint could or did in any manner deprive the plaintiff of any rights or privileges as particularly alleged in Subdivision D hereof.

(G) Except from the legal conclusion of the pleader, the Tenney Committee acted as judges and accused in the same cause at said hearing and/or held and/or conducted the same in an unfair, partial or unlawful manner.

(H) Any act alleged in Paragraph 8 of said complaint relating to Elmer E. Robinson deprived or tended to deprive plaintiff of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(I) The asking of questions which had previously been answered by plaintiff could in any manner deprive him of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(J) Whether testimony previously given by the Tenney Committee, the reading of either a true or a false criminal record of plaintiff or a newspaper article wherein an affidavit of plaintiff was

called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee to Jack B. Tenney "that Mr. Brandhove was a liar," in any manner deprived, directly or indirectly, this plaintiff of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(K) Any act of the Committee in respect to counsel for plaintiff as alleged in Paragraph 8 in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(L) Any act alleged in Paragraph 9 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(M) Any act alleged in Paragraph 10 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(N) Any provision of the resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States for want of certainty if read into any criminal statute, as alleged in Paragraph 11 of said complaint.

(O) The resolution creating the Tenney Com-

mittee is in violation of the 14th Amendment of the Constitution of the United States in any particular.

(P) Except from the legal conclusion of the pleader, that said hearing on January 29, 1949, was held for any of the purposes set forth in Paragraph 11 of said complaint.

(Q) Except from the legal conclusion of the pleader.

(1) That the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff;

(2) That said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and/or as also expressly required under the resolution creating the Tenney Committee;

(3) That the questions asked of plaintiff at said hearing were not material and proper as required by Section 9412 of the California Government Code.

(R) Any act alleged in Paragraph 12 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(S) Except from the legal conclusion of the pleader, the acts of defendants alleged in said complaint or done or participated in by said defendants were done with intent:

(1) To intimidate and silence plaintiff and/or to deter or prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances.

(2) To deprive him of the equal protection of the laws, due process of law and from the enjoyment of equal privileges and immunities as a citizen of the United States under the law.

(T) Except from the legal conclusion of the pleader, any act alleged in said complaint and particularly in Paragraph 13 thereof would intimidate, silence, prevent, deter and deprive plaintiff from any of the rights set out in Paragraph 13.

(U) The defendants or any of them conspired for any of the purposes set forth in said complaint and/or acted in furtherance of said or any conspiracy in the manner therein set forth.

(V) The defendants or any of them conspired at all.

(W) Any act of all or any of the defendants attempted to be alleged in said complaint entitles plaintiff to punitive damages.

(X) The defendant incurred expenses in the sum of Ten Thousand Dollars ($10,000.00) for all or any of the items set forth in Paragraph 15 of said complaint.

VII.

That said complaint is ambiguous in each and

every particular in which it is hereinabove alleged to be uncertain.

VIII.

That said complaint is unintelligible in each and every particular in which it is hereinabove alleged to be uncertain.

Wherefore, defendants pray that plaintiff take nothing by said action and that said complaint be dismissed, that a judgment of dismissal be entered in favor of these defendants and for their costs of suit and for such other and further relief as the Court may deem advised.

Dated: May 19, 1949.

HAROLD C. FAULKNER,
MELVIN, FAULKNER,
SHEEHAN & WISEMAN.
WILBUR F. MATHEWSON,
FRED M. HOWSER,
J. FRANCIS O'SHEA,
FRED B. WOOD,

Attorneys for Defendants Other Than Elmer E. Robinson.

NOTICE OF HEARING ON MOTION TO DISMISS

To: Plaintiff above named and to Messrs. Martin J. Jarvis, Richard O. Graw and Elmer P. Delany, his attorneys.

You and each of you will please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 276, United States Courts and Post Office Building, City of San Francisco, State of California, on Monday, the 6th day of June, 1949, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

HAROLD C. FAULKNER,
MELVIN, FAULKNER,
SHEEHAN & WISEMAN.
WILBUR F. MATHEWSON,
F. N. HOWSER,
J. FRANCIS O'SHEA,
FRED B. WOOD,

Attorneys for all defendants in the above entitled action save and except defendant Elmer E. Robinson.

Receipt of copy acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO DISMISS

I.

The suit is not one arising under the Constitution or laws of the United States.

A. Where diversity of citizenship is not shown, the Court has no jurisdiction unless a substantial question arising under a Federal law or the Constitution is disclosed in the pleading. Ex Parte Poresky, 290 U. S. 30.

B. Attack on the validity of State of California Resolution No. 75 creating the Senate Fact-Finding Committee on Un-American Activities does not create a substantial question of invalidity under the laws of the United States or the Constitution thereof. Dennis v. United States, 171 R. (2d) 986.

C. A suit to enforce a right which takes its origin in the laws of the United States is not for that reason alone one arising under the laws unless it really in substance involves a dispute respecting the validity, construction or effect of such a law upon the determination of which the case depends. Viles v. Symes, 129 F. (2d) 828.

D XIVth Amendment to the Constitution of the United States.

II.

That said complaint fails to disclose any facts or circumstances indicating an existing or continuing conspiracy or act interfering with or impeding in any manner any right of plaintiff under the Constitution of the United States. (See Complaint.)

III.

That several causes of action have been improperly joined. (See Rules 8, 9 and 10, Rules of Civil Procedure.)

Each claim founded upon a separate transaction or occurrence must be separately stated. Bottone v. Lindsley, 170 F. (2d) 75.

IV.

The complaint is uncertain, ambiguous and unintelligible.

V.

It is to be observed that both houses of the Legislature of the State of California, pursuant to concurrent resolution and pursuant to Section 2, Article 4 of the Constitution of the State of California,

"Resolved that the 1949 regular session of the Legislature of the State of California shall adjourn for recess at 3:00 o'clock p.m. on the 24th day of January, 1949, and shall reassemble at 12:00 o'clock m. on March 7, 1949."

VI.

That every right claimed by plaintiff to be violated was, according to the allegations of plaintiff's complaint, completely observed in so far as any act of conduct of these defendants is concerned.

VII.

That Section 43 and 47 (3) of Title 28 U.S.C.A. relied upon under the claimed facts and circumstances set forth in plaintiff's complaint as establishing a claim for relief, are void for uncertainty under the laws of the United States. Screws v. United States, 325 U. S. 91, 65 S. Ct., 1031, 1033.

Dated: May 19, 1949.

Respectfully,

HAROLD C. FAULKNER,

MELVIN, FAULKNER,

SHEEHAN & WISEMAN.

WILBUR F. MATHEWSON,

F. N. HOWSER,

J. FRANCIS O'SHEA,

FRED B. WOOD,

Attorneys for All Defendants Except Elmer E. Robinson.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

Now comes Elmer E. Robinson and files this motion to dismiss the complaint of plaintiff in the above-entitled action.

I.

That said complaint does not state facts sufficient to confer upon the above-entitled court jurisdiction of the subject matter of said complaint for the following reasons and in the following particulars:

(1) That the complaint in the above-entitled action does not state facts sufficient to show that Senate Resolution No. 75, June 20, 1947, is invalid under the 14th Amendment of the Constitution of the United States if read into any criminal statute for want of certainty.

(2) That no diversity of citizenship between the parties is disclosed in said complaint.

(3) That said complaint fails to state facts sufficient to disclose any substantial claim for relief arising under the laws of the United States and/or the Constitution thereof.

II.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which relief can be granted.

III.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which damages may be recovered from this defendant.

IV.

That said complaint is not a short and plain statement of the claim of plaintiff showing that the plaintiff is entitled to relief.

V.

That there is a misjoinder of causes of action in that there are joined together several causes of action in said complaint and not stated separately therein, to wit:

(1) A cause of action relating to a transaction or occurrence wherein it is claimed by plaintiff that he was deprived of certain rights in respect to circulating a petition to the Legislature of the State of California.

(2) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to being subpoenaed to appear before the Tenney Committee.

(3) A cause of action based upon a claim that plaintiff was deprived of certain rights in respect to his appearance and the conduct of defendants, Jack B. Tenney, The Senate Fact Finding Committee on Un-American Activities, a California legislative committee, Hugh M. Burns, Nelson S. Dil-

worth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson, at a hearing before the Tenney Committee.

(4) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to the filing of a complaint in the Municipal Court of the City of Sacramento.

(5) A cause of action wherein it is claimed that plaintiff was deprived of certain rights by reason of a claimed invalidity of the resolution creating the Tenney Committee.

(6) A cause of action wherein it is claimed that plaintiff was deprived of certain rights pertaining to due process of law.

(7) A cause of action wherein it is claimed that plaintiff was deprived of equal protection of the laws.

(8) A cause of action wherein it is claimed that plaintiff was deprived of the right of free speech.

(9) A cause of action wherein it is claimed that plaintiff was deprived of his rights to petition the Legislature for redress of grievances.

(10) Plaintiff attempts to allege a cause of action against the defendants collectively and individually with a cause of action based on the claim that a conspiracy existed between them.

VI.

That said complaint is uncertain in that it does

not appear therein nor can it be ascertained therefrom how or in what manner or by what means:

(a) Why the subpoena referred to in Paragraph 3 of the complaint should, or what authority in law required it to, state the purpose or object of said hearing or to refer to or state the purpose or object of plaintiff's required testimony thereat, as alleged in said paragraph.

(b) Any of the matters referred to in Paragraph 4 of said complaint could or have in any manner affected any legal or constitutional right, privilege or immunity of plaintiff.

(c) The appearance of Elmer E. Robinson as a voluntary witness and denying the truth of the charges set forth in plaintiff's so-called petition could in any manner thwart the charges contained in said petition and defeat the purpose stated in said petition.

(d) The sending of either or any of the telegrams referred to in Paragraph 5 of said complaint could in any manner deprive or subject plaintiff to the deprivation of any rights, privileges or immunities secured by the Constitution and laws as set forth in Section 43, Title 8, USCA, or of the equal protection of the laws or of equal privileges or immunities under the laws as provided for in Section 47, Subdivision 3, Title 8, USCA.

(e) Any act alleged in Paragraph 6 of said complaint could deprive plaintiff of any rights as set forth in the preceding subdivision. —

(f) Any act alleged in Paragraph 7 of said complaint could or did in any manner deprive the plaintiff of any rights or privileges as particularly alleged in Subdivision D hereof.

(g) Except from the legal conclusion of the pleader, the Tenney Committee acted as judges and accused in the same cause at said hearing and/or held and/or conducted the same in an unfair, partial or unlawful manner.

(h) Any act alleged in Paragraph 8 of said complaint relating to Elmer E. Robinson deprived or tended to deprive plaintiff of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(i) The asking of questions which had previously been answered by plaintiff could in any manner deprive him of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(j) Whether testimony previously given by the Tenney Committee, the reading of either a true or a false criminal record of plaintiff or a newspaper article wherein an affidavit of plaintiff was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee to Jack B. Tenney "that Mr. Brandhove was a liar," in any manner deprived, directly or indirectly, this plaintiff of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(k) Any act of the Committee in respect to counsel for plaintiff as alleged in Paragraph 8 in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(l) Any act alleged in Paragraph 9 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(m) Any act alleged in Paragraph 10 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(n) Any provision of the resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States for want of certainty if read into any criminal statute, as alleged in Paragraph 11 of said complaint.

(o) The resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States in any particular.

(p) Except from the legal conclusion of the pleader, that said hearing on January 29, 1949, was held for any of the purposes set forth in Paragraph 11 of said complaint.

(q) Except from the legal conclusion of the pleader,

1. That the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff;

2. That said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and/or as also expressly required under the resolution creating the Tenney Committee;

3. That the questions asked of plaintiff at said hearing were not material and proper as required by Section 9412 of the California Government Code.

(r) Any act alleged in Paragraph 12 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(s) Except from the legal conclusion of the pleader, the acts of defendants alleged in said complaint or done or participated in by said defendants were done with intent:

1. To intimidate and silence plaintiff and/or to deter or prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances.

2. To deprive him of the equal protection of the laws, due process of law and from the enjoyment of

equal privileges and immunities as a citizen of the United States under the law.

(t) Except from the legal conclusion of the pleader, any act alleged in said complaint and particularly in Paragraph 13 thereof would intimidate, silence, prevent, deter and deprive plaintiff from any of the rights set out in Paragraph 13.

(u) The defendants or any of them conspired for any of the purposes set forth in said complaint and/or acted in furtherance of said or any conspiracy in the manner therein set forth.

(v) The defendants or any of them conspired at all.

(w) Any act of all or any of the defendants attempted to be alleged in said complaint entitled plaintiff to punitive damages.

(x) The defendant incurred expenses in the sum of Ten Thousand Dollars ($10,000.00) for all or any of the items set forth in Paragraph 15 of said complaint.

VII.

That said complaint is ambiguous in each and every particular in which it is hereinabove alleged to be uncertain.

VIII.

That said complaint is unintelligible in each and every particular in which it is hereinabove alleged to be uncertain.

Wherefore, defendant, Elmer E. Robinson, prays that plaintiff take nothing by said action and that said complaint be dismissed, that a judgment of dismissal be entered in favor of the defendants and for their costs of suit and for such other and further relief as the Court may deem advised.

Dated: May 19, 1949.

McGUIRE & LAHANIER.
By /s/ W. A. LAHANIER,
Attorneys for Defendant,
Elmer E. Robinson.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO DISMISS

In support of the motion of the defendant, Elmer E. Robinson, it is his contention that he committed no acts which violated any Civil Rights of the plaintiff, and that, aside from legal conclusions, the complaint fails to allege the commission of any acts by the defendant, Elmer E. Robinson, whereby the plaintiff was deprived of any civil rights.

Where lack of diversity of citizenship is shown, Court has no jurisdiction unless a substantial Federal or Constitutional law is disclosed in the pleading. Ex Parte Poresky 29 F. S. 30.

Attack on the validity of the State of California

Resolution No. 75 creating the Senate Fact-Finding Committee on Un-American Activities does not create a substantial question of invalidity under the laws of the United States or the Constitution thereof. Dennis vs. United States, 171 F. (2d) 986. McGrain vs. Dougherty, 273 U. S. 135.

For a suit to enforce a right which takes its original in the laws of the United States is not for that reason alone one arising under the laws unless it really in substance involves a dispute respecting the validity, construction or effect of such a law upon the determination of which the law depends. Viles vs. Symes, 129 F. (2d) 828.

That each claim formed upon a separate transaction or occurrence is not separately stated in said complaint. (See for further particulars the next succeeding paragraph.) Bottone vs. Lindsley, 170 F. (2d) 75.

That if Sections 43 and 47 are relied upon under the claimed facts and circumstances set forth in plaintiff's complaint said sections are void for uncertainty under the laws of the United States. Screws vs. United States, 325 U. S. 91. (65 Supreme Court 1031 and 1033.)

That said complaint fails to disclose any facts or circumstances indicating an existing or continuing conspiracy or act interfering with or impeding in any manner any right of plaintiff under the Constitution of the United States.

For plaintiff to invoke jurisdiction of Federal District Court on grounds that he seeks protection of a

Federal right, the complaint, on its face, must appear to raise a "substantial Federal question," and mere claim in words or contention, which is obviously without merit, is insufficient. Williams vs. Miller, 48 F. (Supp.) 277, aff'd. 317 U. S. 599.

That every right claimed by laintiff to be violated was, according to the allegations of plaintiff's complaint, completely observed insofar as any act of conduct of defendant Elmer E. Robinson was concerned.

Plaintiff's complaint expressly alleges that defendant, Elmer E. Robinson, was acting as an individual and not under color of authority. Hence, no cause of action is stated as to him, even if we assume that the legal conclusions of the complaint would be sufficient to state a cause of action.

Powe vs. United States, 109 Fed. (2d) 147.

Respectfully submitted,
McGUIRE & LAHANIER.
By /s/ W. A. LAHANIER,
Attorneys for Defendant,
Elmer E. Robinson.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES SUPPLEMENTING ORAL ARGUMENT ON MOTION TO DISMISS

Plaintiff attempts to state a cause of action for damages against certain of the members of the Senate of the State of California, by reason of their official conduct while serving on the Senate Fact-Finding Committee on Un-American Activities in California.

Defendants have moved to dismiss.

Defendants, members of the State Senate, respectfully urge in support of their motion:

I.

When ordinary and existing rules for the construction of pleadings are applied—plaintiff fails completely to allege any fact or circumstance showing deprivation of any right, privilege or immunity under the Constitution of the United States, including the 14th Amendment.

1. Due Process of Law. No fact is alleged indicating in the silghtest degree the deprivation of due process of law. In reading the complaint and trying to follow the argument of counsel, it appears that some claim is made that a right of the defendant was invaded by reason of having been served with a subpoena, which is made a part of the complaint.

In connection with the issuance of subpoenas by committees of the Senate or Assembly, the form

thereof is prescribed by Section 9402 of the Government Code, which reads as follows:

"A subpena is sufficient if it:

(a) States whether the proceeding is before the Senate, Assembly, or a committee.

(b) Is addressed to the witness.

(c) Requires the attendance of the witness at a time and place certain.

(d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired."

Every requirement of this section is complied with.

It must be borne in mind that the Legislature is and has been held to be "* * * the grand inquest of the Commonwealth." Ex parte McCarthy, 29 Cal. 395, 402. A witness subpoenaed before a legislative committee is analagous to a witness subpoenaed before a grand jury. Applying the analogy, we find plaintiff's claim has consistently been decided adversely to his contention. See In re Black, 47 F. 2d 543; also, Blair v. United States, 250 U. S. 273. Plaintiff cited no authorities in support of his position.

2. Freedom of Speech. The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke

the things he wanted to say, then remained silent and refused to answer any questions.

3. The privilege of petitioning the Legislature for the redress of grievances. Although a claim is made in this respect by plaintiff and appears to be the main point relied upon, plaintiff was unable at the oral argument to indicate any fact or circumstance indicating in the slightest degrees the deprivation of this right by the act of any defendant in the case at bar or anyone else.

The requirement to plead specific facts as distinguished from conclusions of law is essential in cases of this type. See opinion of Judge Wilbur in Williams v. Miller, 48 F. Supp. 277. In denying certiorari in this case, the Supreme Court of the United States held in accordance with the opinion of Judge Wilbur. See 317 U. S. 599.

II.

One of the bases of plaintiff's complaint is the claim that the resolution creating the Tenney Committee, if read into any criminal statute, is in violation of the 14th Amendment to the Constitution of the United States for want of certainty. See Paragraph 11 of plaintiff's complaint. This same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. In the case of Dennis v. United States, 171 F. 2d 986, the court disposes of this point as follows:

"Since one of the chief points raised by appellant is a general attack on the constitutionality of the creation of the Committee and of the resolutions, rules and statute authorizing its activities, it may be said at the outset that it is the self-same Committee, operating under the same set of resolutions, rules and statute as has been recently passed on by at least two Courts of Appeals, and in two of the cases by the Supreme Court of the United States in denying petitions for certiorari. See Josephson v. United States, 2 Cir., 1947, 165 F. 2d 82, certiorari denied, 1948, 333 U. S. 838, 68 S. Ct. 609, rehearing denied, 1948, 333 U. S. 858, 68 S Ct. 731; Barsky v. United States, 1948, ... U. S. App. D. C. ....., 167 F. 2d 241, certiorari denied, 68 S. Ct. 1511, 334 U. S. 843; and Eisler v. United States, 1948, ... U. S. App. D. C. ....., 170 F. 2d 273.

(1) These cases were to the unanimous effect that the constitutionality of the authority of the Committee should be upheld, that the creation of the Committee and the matters confided to it for investigation were constitutional and lawful. * * * "

However, the question has been set at rest by the recent decision of the Supreme Court in Vern Smith v. The People of the State of California. This was a petition for appeal to the Supreme Court of the United States in which the conviction of the appellant was sought to be reversed on the grounds that Senate Resolution No. 75 (the resolution appended to the complaint) was unconstitu-

tional. The Supreme Court of the United States in passing upon this petition ruled as follows: (69 S. Ct. 893)

"Appeal from the Superior Court in and for the County of Alameda, State of California.

April 25, 1949. Per Curiam: The appeal is dismissed for want of a substantial federal question."

Further, the Supreme Court of the State of California, upon an attack upon the constitutionality of the resolution creating the "Tenney Committee," ruled against plaintiff on this subject by denying his application for a writ of habeas corpus.

III.

Claims in the form of legal conclusions are made as to the motives of the Committee in subpoenaing the witness and holding the hearing. They appear to be (a) to suppress anyone criticizing the Committee and (b) to prevent plaintiff from petitioning the Legislature.

These Claims Cannot Be Sustained Factually

In respect to (a) above, no fact is alleged in the complaint from which this inference could be drawn. On the contrary plaintiff alleges that the Committee was under attack by certain members of the State Assembly. See Exhibit "F," top of page 5. The court can take judicial notice of the fact that all such committees have been under constant attack and abuse by communists and communist inspired outlets. Such committees have likewise been criticized by others unconnected with the communistic movement.

In respect to (b) above, it is already covered in Subdivision 3 of I above.

These claims likewise cannot be sustained under the law.

In the case of Dennis v. United States, supra, the court said:

"* * * it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

The decision in United States v. Josephson, 165 F. 2d 82, touches upon this subject and is well worth considering by the court.

In the oral argument we read to the court from Eisler v. United States, 170 F. 2d 273. The part which we read is found on page 278 and is as follows:

"* * * During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees. * * *"

Although there may be no presumption as to the constitutionality of legislation enacted when civil rights are concerned, the fact still remains that the law is that there is a presumption that the action of the legislative body is legitimate. See cases heretofore cited and McGrain v. Daugherty, 273 U. S. 135.

IV.

State Senators Are Exempt From Civil Liability

Plaintiff's cause of action must fall for a further reason:

Members of the State Senate are privileged against civil liability arising out of the performance of legislative functions. The allegations in the complaint show and it is insisted by the plaintiff that the actions of the State Senate complained of in the present case were performed during a session of the Legislature and in the official discharge of the duties of the Senate under a law which plaintiff claims is unconstitutional.

The privileges secured to members of a legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is Kilbourn v. Thompson, 103 U. S. 168. The discussion on this interesting subject starts on page 201. On page 203 the Supreme Court quotes with approval the language of Mr. Chief Justice Parsons in Coffin v. Coffin. The basis of the privilege is well expressed, as follows:

"* * * 'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. * * *' "

The subject is well discussed in Barsky v. U. S., 167 F. 2d 241, at 250. This latter case also contains a splendid discussion of the entire subject matter of plaintiff's law suit.

The privileges discussed in this subdivision are clearly inherent in state legislators. This is pointed out by the quotation cited with approval in Kilbourn v. Thompson, supra, at page 204 by Mr. Justice Story.

Section 1 of Article IV of the Constitution of the State of California provides: "The legislative power of the state shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' * * *." The principles of law laid down in Kilbourn v. Thompson and the citations from Coffin v. Coffin and Chief Justice Story therein contained are inherent in the Legislature of the State of California. There is no limitation on this right in the State Constitution. The language of Chief Justice Gibson in Collins v. Riley, 24 C. 2d 912, commencing at the bottom of page 915, is particularly applicable:

"This argument overlooks the fact that our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legis-

lature (In re Madera Irr. Dist., 92 Cal. 296 (28 P. 272, 675, 29 Am. St. Rep. 106, 14 L.R.A. 755); Macmillan Co. v. Clarke, 184 Cal. 491 (194 P. 1030, 17 A.L.R. 288); People ex rel. Smith v. Judge of the Twelfth District, 17 Cal. 547; Sheehan v. Scott, 145 Cal. 684 (79 P. 350); Fifts v. Superior Court, 6 Cal. 2d 230 (57 P. 2d 510); Mitchell v. Winnek, 117 Cal. 520 (49 P. 579)) and 'that we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.' (Fitts v. Superior Court, supra.) If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used."

A splendid discussion of the entire subject matter commences on page 403 of the decisions of the Supreme Court of the State of California in Ex parte McCarthy, 29 Cal. 395.

The law seems to be clear on the subject that members of the State Senate of California are exempt from any civil liability by reason of acts performed in their functions as state legislators. Other cases which touch upon this subject and many additional reasons for supporting the independence of the Legislature from interference by any other branch of the government are Hearst v. Black, 87 F. 2d 68, commencing at the bottom of page 71; United States v. Bryan, 72 F. Supp. at 58; Cochran v. Couzens, 42

F. 2d 783. This is a later case applying the reasoning in Kilbourn v. Thompson and Coffin v. Coffin, supra.

The same principle which exempts the state legislator when performing his legislative function also applies to judges of courts of record. A splendid discussion on this subject is found in the opinion of the Supreme Court of the United States in the leading case of Spalding v. Vilas, 161 U. S. 483.

A further observation on this subject: When the question was presented to counsel for plaintiff to discuss with the court this subject matter, counsel in his oral argument discussed everything except the exemption of state legislators from personal responsibility. No cases were cited by plaintiff inconsistent with the views here expressed.

It is respectfully submitted that the complaint should be dismissed with prejudice.

Dated: June 18, 1949.

/s/ HAROLD C. FAULKNER,
MELVIN, FAULKNER,
SHEEHAN & WISEMAN.
F. N. HOWSER,
J. FRANCIS O'SHEA,
FRED B. WOOD,

Attorneys for All Defendants in the Above-Entitled Action Save and Except Defendant Elmer E. Robinson.

[Endorsed]: Filed June 18, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DENIAL OF DEFENDANTS' MOTIONS TO DISMISS COMPLAINT

I.

Jurisdiction of the Federal Court in the Instant Case.

By enacting section 43 of U.S.C, Title 8, Congress gave a right of action sounding in tort to every individual whose federal rights are infringed by any person acting under color of state law.

Picking v. Penn. Ry. Co.,
151 F. (2d) 240, 249.

Hague v. C.I.O.,
307 U. S. 496.

Screws v. United States,
325 U. S. 91.

Refoule v. Ellis,
74 F. Supp. 336.

The present action is predicated upon sections 43 and 47(3) of U.S.C. Title 8 and section 51, 52 of U.S.C. Title 18 which are construed together as being in pari materia with each other.

Picking v. Penn. Ry. Co.,
(supra) p. 248.

Hague v. C.I.O.,
(supra) pp. 531, 532.

United States v. Classic,
313 U. S. 299.

Screws v. United States,
(supra) pp. 98, 99.

Gordon v. Garrson,
(DC Ill. 1948) 77 F. Supp. 477:

Federal Court has jurisdiction by virtue of section 41(14) of Title 28 U.S.C. and hence diversity of citizenship and jurisdictional amount need not be alleged in complaint under section 43 and sections 47, 48 of Title 8 U.S.C.

II.

State Law Cannot Vest Any Person With Immunity to Violate the Federal Rights of Another

The provisions of the federal Civil Rights Act are directed against anyone clothed with state authority who violates the federal rights of another by abuse of his state authority.

United States v. Classic,
(supra) p. 326:

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Ex parte Virginia,
100 U. S. 339, 346, 347:

"* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies of takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so, the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

In Picking v. Penn. Ry. Co., (supra) it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section.

Where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York, arose under section 47 Title 8 U.S.C., Pennsylvania statutes sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from liability in the instant case.

See also: Screws v. United States, (supra) p. 114 and cases there cited Cf. notes 6-8.

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

"The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated." (Rutledge, J. concurring in result, Screws v. United States, p133.)

Whether the federal law, as distinguished from state law, can vest such immunity in anyone exercising federal governmental power, is not in issue in this case, and therefore cases cited by defendants with respect to Congress or congressional committees cannot support the contention made by defendants on oral argument in this case that they are immune from the sanctions of the Civil Rights Act. To hold otherwise flys in the face of the purpose and the language of the Civil Rights Act, which has been applied not only to improper state legislation, but

also to members of the state judiciary, a state Governor, state school boards and state election officials as well as to peace officers of a state.

Wherever the federal Civil Rights Act applies, damages are recoverable as well as injunctive relief.

Picking v. Penn. Ry. Co.,
(supra).

Gordon v. Garrson,
(supra).

Chapman v. King,
154 F. (2d) 460.

Bomar v. Keyes,
162 F. (2d) 136.

Brickhouse v. Brooks,
165 F. 534.

III.

The Present Action Is Based on Intentional Abuse of State Authority to Deny a Political Opponent: (a) The Right of Free Speech, (b) the Right to Petition the Legislature for Redress of His Grievances, (c) the Right to a Fair and Impartial Hearing in Matters Concerning His Person, Privacy, Opportunity to Earn a Living and His Honor, and (d) the Equal Protection of the Laws.

All these rights are fundamental federal rights and as such are protected by the federal Constitution and the laws of the United States, and therefore within the provisions of sections 43 and 47(3).

Hague v. C.I.O.,
(supra).

United States v. Classic,
(supra).

Screws v. United States,
(supra).

The Complaint necessarily read as a whole alleges in substance that when the defendants became aware of plaintiff's political criticism voiced in his petition for the purpose of persuading the legislators of California to discontinue further appropriations for the Tenney Committee, they abused their state authority as members of the criticized legislative committee by using said power to silence plaintiff, vilify his character, deter him from further action, this by attempting to cause the initiation of a criminal prosecution for perjury by state telegrams to various district attorneys, by compelling his attendance at an unfair and partial hearing of said committee, by citing him for contempt at such hearing on his refusal to answer questions on the grounds raised by him at said hearing and pleaded by reference in the Present Complaint, and by compelling him to stand trial on a criminal contempt charge after having suffered imprisonment based on such charge.

A clear answer to defendants' question at the oral argument on their motions to dismiss in this case as to how free speech and freedom to petition the Legislature were violated by the conduct of defendants

alleged in the Complaint, is that these freedoms were infringed upon by more subtle and artful methods than putting a gag in one's mouth or snatching a petition from one's hands; not only is it the supreme law of the land that these freedoms can be effectively exercised only in the absence of State suppression, but it is a fundamental principle upon which our democracy was founded.

If he who dares to speak his mind is for that reason subject to the treatment accorded plaintiff by state authority without such authority having violated the federal law on the pleaded facts of the instant case, then those freedoms become words without substance.

Thornhill v. Alabama,
310 U. S. 88, 97.

Thomas v. Collins,
323 U. S. 516, 530.

Jones v. Securities Comm.,
298 U. S. 1, 26.

Schneiderman v. United States,
320 U. S. 118.

West Va. State Bd. of Ed. v. Barnette,
319 U. S. 624.

Hannegan v. Esquire,
327 U. S. 146.

Terminiello v. City of Chicago,
93 L. Ed. Adv. Op. 55.

IV.

It Is Irrelevant Whether the California Legislature Was or Was Not in Session at the Time of the Tenney Committee Hearing in Question and Whether or Not Said Committee Can Properly Hold Hearings Between Sessions of the Legislature.

He who is clothed with state authority and purports to exercise the same is responsible under the Civil Rights Act even if the wrong done exceeded the state power vested in the wrongdoer.

Home Tel. & Tel. Co. v. Los Angeles,
227 U. S. 278, 287.

Screws v. United States,
(supra) pp. 110, 114, 115.

United States v. Classic,
(supra) p. 326.

As a matter of fact, if it be assumed that the committee in question could not lawfully hold the hearing complained of as defendants have urged on this Court, than plaintiff would have to show no more than this fact to conclusively establish a violation of section 43 of the Civil Rights Act by defendants.

V.

The Issue of the Constitutionality of the California Senate Resolution Creating the Tenney Committee Is Immaterial in the First Instance and

Need Not Be Gone Into Before the Facts as to Other Issues Are Determined.

United States v. C.I.O.,
335 U. S. 106, 110, 124, 125.

Rescue Army v. Municipal Court,
331 U. S. 549, 568, 569.

Ashwander v. T. V. A.,
297 U. S. 288, 346-348 and cases there cited.

Williams v. Miller,
(DC Cal. 1942) 48 F. Supp. 277; affirmed
317 U. S. 599, holding;

In considering the sufficiency of a complaint as raising substantial federal question within the jurisdiction of the federal court, essential facts should be determined before passing upon grave constitutional questions.

For another aspect of this question,
See: Anderson v. Meyers,
182 F. 233; affirmed 238 U. S. 368.

VI.

Liability of Defendant Robinson

Plaintiff's cause of action under section 43 extends to any person who, without himself being clothed with state authority, engaged in a conspiracy with others so clothed and acting under color of state law.

Downs v. United States,
3 F (2d) 855, 857.

Picking v. Penn. Ry. Co.
(supra).

Johnson v. United States,
158 F. 69.

"A defendant, therefore, may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit."

See also: 11 Am. Jur. 547 footnote 7; 5 A.L.R. 787; 74 A.L.R. 1114.

In Picking v. Penn Ry Co., 5 F. R. D. 76 at 77 on motion for a more specific statement the Court stated the rule as follows:

"In the complaint in a civil conspiracy case such as this in order to be sufficiently specific and definite it should be alleged: (1) That the defendants conspired to do an unlawful act; (2) facts as to the acts performed by each defendant in furtherance of the conspiracy which acts were not privileged or compelled by law; (3) facts as to the overt acts in pursurance of the conspiracy done by certain of the alleged conspirators; (4) facts from which the Court can see, if the facts are true, the damage which would naturally or possibly result from the acts stated."

Applying these criteria to the instant case:

By paragraphs 2, 3, 5, and 8 plaintiff has incorporated by reference Exhibits A, B, C, D, E, and F which are attached to and pleaded as part of the instant complaint. Paragraph 14 of the present complaint sets out the civil conspiracy coupled with

paragraph 13 therein. (Requirement #1.) Paragraphs 3 up to and including 14 satisfy requirement #2 in the Picking case. Paragraphs 4, 5, 6, 7, 8, 13, and 14 meet requirement #3 as to defendant Robinson. And paragraph 10 and the whole complaint comply with requirement #4 hereinabove set forth. See also in particular pages 15 up to and including 17, plaintiff's Exhibit F, re defendant Robinson.

All of the defendants including defendant Robinson, since they engaged in such conspiracy are liable in damages also under section 47(3).

Picking v. Penn Ry. Co.,
5 F. R. D. 76, 77.

"If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."

VII.

State Court Proceedings Prior to This Action

On oral argument on their motions to dismiss, defendants underline the fact that a petition by plain-

tiff for an extraordinary writ was denied by the California Supreme Court.

The actual facts in regard to said writ are as follows: After plaintiff's arrest and incarceration pursuant to the criminal contempt charge filed on behalf of The Tenney Committee, and prior to standing trial on said charge, plaintiff asked the California Supreme Court for an extraordinary writ in the nature of habeas corpus to restore him to his liberty without the necessity of standing trial. Since the California Supreme Court would not go into the important constitutional questions raised by plaintiff's petition prior to a determination of the facts at trial, the extraordinary relief was denied. Obviously this denial by the Court decided nothing more than plaintiff's right to relief by extraordinary process before determination of the facts at trial.

Thus the trial took place which resulted in a hung jury with the count of 11 to 1 for acquittal of this plaintiff, 11 of the jurors stating that they did not believe The Tenney Committee hearing in question was either fair or impartial.

Wherefore, it is respectfully submitted that the defendants' motions to dismiss Complaint, and each of them, be denied.

Dated: San Francisco, California, June 16, 1949.

/s/ MARTIN J. JARVIS,
/s/ RICHARD O. GRAW.
/s/ ELMER P. DELANY,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF DEFENDANT ELMER E. ROBINSON

Defendant Elmer E. Robinson files this supplemental memorandum in support of his motion to dismiss plaintiff's complaint.

It is, and has been, this defendant's position that the complaint fails to allege a single fact from which it can be remotely inferred that any act of this defendant deprived plaintiff of any civil rights.

It is a strange line of reasoning to propose that plaintiff's freedom of speech was curtailed because defendant Robinson exercised his right of free speech in answering the statements made by plaintiff.

Plaintiff appears to argue that he alone is entitled to the right to freedom of speech, and that any person undertaking to answer him is violating this right.

It is submitted that this defendant at no time did anything different than would be expected of any normal person desiring to be heard in his own defense in any forum where his honor or integrity is attacked.

The supplemental brief of the other defendants fully points out the deficiencies in plaintiff's complaint, and correctly points out the legal and factual barriers to plaintiff's right to recover damages.

In addition to the points raised by the other defendants, this defendant again calls the court's attention to his status as a private citizen as pleaded in plaintiff's complaint.

At the hearing on June 13th, plaintiff's counsel indicated that they faced a substantial legal problem so far as the defendant Elmer E. Robinson was concerned. This problem arises from the law that the Federal Government is without power to enact legislation granting a cause of action against an individual, who violates a citizen's civil rights, where such individual does not act under color of State authority. Powe vs. United States, 109 Fed. (2) 147.

Plaintiff endeavors however, to hold the defendant, Elmer E. Robinson on a theory that even though he would not be responsible acting alone, he is responsible if he conspires with persons who are acting under color of State authority. In support of this position, counsel for plaintiff again cited the court to the cases referred to in their memorandum in support of the Order to Show Cause for a preliminary injunction in the previous action No. 28729H in the above court.

These cases merely hold that A may be criminally guilty of conspiring with B to commit a criminal act, even though A could not commit the act himself. For example, in the Downs case, 3 Fed. (2) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves even though they could not personally be convicted of the substantive crime of offering themselves a bribe. In the Rabinowitch case, 238 U. S. 78, six persons were indicted for conspiracy to violate the United States Bankruptcy Act

relating to the concealing of property. Three of the persons owned the property; three did not. However, the court properly held that all six could be convicted of conspiracy to conceal the property.

These cases cited by counsel are criminal cases, and obviously not applicable in the instant case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Wherefore, defendant Elmer E. Robinson respectfully submits that plaintiff's complaint be dismissed.

McGUIRE & LAHANIER.
By /s/ W. A. LAHANIER,
Attorney for Defendant
Elmer E. Robinson.

[Endorsed]: Filed June 20, 1949.

[Title of District Court and Cause.]

ORDER

Defendants' Motion to Dismiss having been briefed, argued, and submitted for ruling,

It Is Ordered that the Motion be and the same hereby is Granted.

Dated:

/s/ GEORGE B. HARRIS,
United States District Judge.

Dennis v. U. S., 171 F. 2d. 986; Smith v. California, 199 Pacific 2d, 325 certiorari denied 336 U. S.

957; Eisler v. U. S., 170 F. 2d 273; Barsky v. U. S., 167 F. 2d 241, 250; Keppleman v. Upton, 84 F. Supp. 478.

[Endorsed]: Filed November 9, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28711H

WILLIAM PATRICK BRANDHOVE,

Plaintiff,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California legislative committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON; and ELMER E. ROBINSON,

Defendants.

JUDGMENT ON MOTIONS TO DISMISS

This cause came on to be heard on defendants' motions to dismiss and the Court having granted said motions as to each and all the defendants,

It is hereby Ordered, Adjudged and Decreed that

the action be dismissed on the merits as to each and all of the defendants, and that defendants recover their costs.

Dated: San Francisco, California, November 16, 1949.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form:

/s/ HAROLD C. FAULKNER,
/s/ W. A. LAHANIER,
Defendants' Attorneys.

[Endorsed]: Filed November 17, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that William Patrick Brandhove, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 16, 1949.

Dated: San Francisco, California, November 22, 1949.

/s/ MARTIN J. JARVIS,
/s/ RICHARD O. GRAW,
/s/ ELMER P. DELANY,
Attorneys for Appellant.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

STATEMENT OF APPELLANT OF THE POINTS ON APPEAL ON WHICH HE INTENDS TO RELY

Plaintiff and appellant hereby sets forth the following points on which he intends to rely on appeal:

1. The Court erred in granting the motion to dismiss made by each and all of the defendants, excepting defendant Robinson, and erroneously dismissed the action as to said defendants.

A. Plaintiff's complaint states a cause of action for damages under the Civil Rights Act against said defendants.

B. State law cannot vest any person with immunity to violate the federal rights of another.

C. The resolution of the California State Senate creating the defendant committee known as The Senate Fact-Finding Committee On Un-American Activities is unconstitutional.

2. The Court erred in granting the motion to dismiss made by defendant Elmer E. Robinson and erroneously dismissed the action as to said defendant.

a. Points A, B and C supra.

b. Plaintiff's cause of action under the Civil Rights Act extends to any person who, without himself being clothed with state authority, engaged in

a conspiracy with others so clothed and acting under color of state law.

Dated: San Francisco, California, November 30, 1949.

/s/ MARTIN J. JARVIS,
/s/ RICHARD O. GRAW,
/s/ ELMER P. DELANY,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Damages Under Civil Rights Act—Contains Exhibits A, B, C, D, E and F.

Motion to Dismiss Complaint—By Defendants other than Elmer E. Robinson.

Memorandum of Points and Authorities on Motion to Dismiss—By Defendants other than Elmer E. Robinson.

Motion to Dismiss Complaint—By Elmer E. Robinson.

Memorandum of Points and Authorities on Motion to Dismiss—By Elmer E. Robinson.

Plaintiff's Memorandum of Points and Authorities In Support of Denial of Defendants' Motions to Dismiss Complaint.

Supplemental Memorandum of Defendant Elmer E. Robinson.

Memorandum of Authorities Supplementing Oral Argument on Motion to Dismiss—By Defendants other than Elmer E. Robinson.

Order Granting Defendants' Motion to Dismiss.

Judgment on Motions to Dismiss.

Notice of Appeal.

Designation of Record on Appeal.

Statement of Appellant of Points on Appeal on Which He Intends to Rely.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of December, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12430. United States Court of Appeals for the Ninth Circuit. William Patrick Brandhove, Appellant, vs. Jack B. Tenney; The Senate Fact Finding Committee on Un-American Activities, a California legislative committee; Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson and Elmer E. Robinson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 16, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 12430

WILLIAM PATRICK BRANDHOVE,
Appellant.

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California legislative committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS

The Clerk will please prepare the Record on Appeal and include there in the following:

1. Plaintiff's complaint.

2. Motion to dismiss complaint by defendants Jack B. Tenney; The Senate Fact-Finding Committee On Un-American Activities, a California legislative committee; Hugh M. Burns, Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton; Clyde A. Watson, together with said defendants' Memorandum of Points and Authorities on Motion to Dismiss.

3. Motion to Dismiss complaint by defendant Elmer E. Robinson together with said defendant's Memorandum of Points and Authorities on Motion to Dismiss.

4. Plaintiff's Memorandum of Points and Authorities in support of Denial of defendants' Motions to Dismiss Complaint.

5. Supplemental Memorandum of defendant Elmer E. Robinson.

6. Memorandum of Authorities (by defendants other than Elmer E. Robinson) Supplementing Oral Argument on Motion to Dismiss.

7. Order granting defendants' Motion to Dismiss dated November 9, 1949.

8. Judgment on Motions to Dismiss.

9. Notice of Appeal with date of filing.

10. This Designation.

11. Statement of Appellant of the Points on Appeal on which he intends to rely.

Statement of Points

Appellant hereby adopts the Statement of Appellant of the Points on Appeal on Which He Intends to Rely heretofore filed in the District Court of the United States for the Northern District of California, Southern Division in this action.

Dated: San Francisco, California, December 15, 1949.

/s/ MARTIN J. JARVIS,
/s/ RICHARD O. GRAW,
/s/ ELMER P. DELANY,
Attorneys for Appellant.

Affidavit of Service by mail attached.

[Endorsed]: Filed December 16, 1949.

No. 12430

United States
Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,

Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California Legislative Committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,

Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Proceedings Had in the United States Court of Appeals
for the Ninth Circuit

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, June 1, 1950.

Before: Healy, Circuit Judge;
Mathes and Driver, District Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Martin J. Jarvis, counsel for appellant, and by Mr. Harold Faulkner, counsel for appellees other than Robinson, and by Mr. W. A. Lahanier, counsel for appellee Robinson, and submitted to the court for consideration and decision.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, June 30, 1950.

Before: Healy, Circuit Judge;
Mathes and Driver, District Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit
No. 12,430

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California Legislative Committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON, and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division

June 30, 1950

Before: Healy, Circuit Judge;
Mathes and Driver, District Judges.

Healy, Circuit Judge.

OPINION

Appellant sued under §§ 43 and 47(3) of Title 8 USCA to recover damages for alleged violations of his civil rights.[1] With one exception the defendants (appellees) are members of what was known as the Tenney Committee of the California State

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

Senate, empowered by a resolution adopted in 1947 to inquire into un-American activities. The remaining defendant is Mayor Robinson of San Francisco. The appeal is from a judgment of dismissal for failure of the complaint to state a cause for relief.

The complaint incorporates an extensive amount of evidentiary matter, bearing for the most part upon a hearing of the Tenney Committee (hereafter referred to as the Committee) before which appellant was summoned as a witness.[2] The plead-

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citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," 8 USCA §43.

"If two or more persons in any State or Territory conspire . . ., for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 8 USCA § 47(3).

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[2] A transcript of the Committee hearing is attached an an exhibit.

ing shows that on January 28, 1949, appellant circulated among the members of the California legislature, then in session at Sacramento, a protest against an appropriation for the continuance of the Committee's activities. The protest, or petition as it is termed in the complaint, charged that the Committee had "used" appellant "as an instrument to smear Congressman Franck R. Havenner as a "Red" when he was candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the Campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end." The particulars of the charge are lengthy but unimportant here. While appellant was engaged in circulating his protest a subpena was served upon him directing him to appear as a witness before the Committee on the following day, January 29, at three o'clock in the afternoon. He appeared at that time with his counsel.[3]

Upon being sworn as a witness appellant gave his name, residence, and occupation, and then referred the Committee to his counsel, who objected to any further questioning. One of the grounds of the objection was that "The purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation." Other grounds were that ap-

[3]Pursuant to a requirement of the state constitution, the legislature adjourned for a period of 30 days, commencing at three o'clock p.m. on January 29, 1949, hence was in recess at the time fixed for appellant's appearance.

pellant had been subpenaed because of the charges made in his petition to the legislature; that the Committee was not and could not be a fair and impartial tribunal; that it was engaged in a political and not a legislative investigation in attempting to acquit itself of appellant's charges; that a joint committee of the Assembly and Senate was the only proper body to investigate such charges; and that the Committee had itself vouched for appellant's veracity by releases and reports in the past. The objections were overruled by the Chairman, but appellant was instructed by his counsel not to respond to questioning. The Chairman then inquired of appellant, "Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?"; to which the answer was, "On advice of counsel, I will not, no, sir."

Questions were then directed to appellant concerning his acquaintance with various named persons, and he was interrogated with respect to his relations with Communists and his affiliation with the Communist Party.[4] All of the questions he declined to answer on the grounds already indicated. The interrogation was presently dropped and apparently the witness was permitted to leave the stand. In the subsequent course of the hearing Chairman Tenney remarked that "Mr. Brandhove has a criminal record." He thereupon made a lengthy statement for the record, in the course of

[4]These same questions, it is alleged, had been put to appellant at former sessions of the Committee, and had been answered by him.

which he recounted crimes with which he said appellant had been charged in various cities over a period ranging from 1930 to 1947, including, among other things, charges of sodomy, grand theft, burglary, malicious mischief, and defrauding an innkeeper. This statement is alleged in the complaint to have been false. Other derogatory matter put into the record by the Chairman included a reference to a newspaper article wherein an affidavit of appellant was termed "a tissue of lies." There was much more along the same line. Finally, Mayor Robinson was called and testified at length in refutation of the charges Brandhove had made against him.

During the course of the session the Committee resolved that a complaint be filed in the proper court charging appellant with a misdemeanor in refusing to answer questions. This course was followed and appellant was arrested on a complaint preferred by the Chairman and was confined in jail from February 1 to February 15, 1949. A trial of the charge before a jury on March 5, 1949, resulted in a disagreement, and the case was dismissed four days later on motion of the district attorney.

Appellant's complaint pieces together these proceedings and incidents, plus the sending by the Committee of two telegrams described in the footnote.[5] The pleading then alleges that the various acts described were "done or participated in by

[5]Copies of these telegrams are attached to the complaint as exhibits. They are dated January 28, 1949, are signed by the Committee chairman and

said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff."

Counsel for appellees argue that this allegation amounts to no more than the conclusions of the pleader, and they claim that the evidentiary matter incorporated in the complaint belies the conclusions. We are unable to agree with the latter proposition. The conclusions are of ultimate fact and some of them appear not to be without a measure of support in the circumstances disclosed.

In such posture of affairs the case should proceed to trial. Of course, a jury or judge may conclude from the showing that the Committee did no more than make legitimate use of the power conferred upon it. The questions put to appellant,

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vice-chairman, and are addressed to the district attorneys of San Francisco and Alameda counties. They refer to Brandhove's charges circulated among the legislators and to sworn testimony of Brandhove earlier given before the Committee, said in the telegrams to be inconsistent or at variance with the charges. The officials addressed are urged to charge Brandhove with perjury or to have the matter presented to the grand jury of their respective counties. It does not appear whether the officials addressed took any action responsive to the telegrams, but it is fairly inferable that they did not.

taken by themselves, seem to be unobjectionable, and they bear substantial relation to the general subject the Committee was empowered to inquire into. In these inquiries, too, it is possible to discern a purpose on the Committee's part of determining whether sworn information appellant had formerly given the Committee might still be relied on as true, or whether it should now be disregarded as false. We think, also, that the Committee, had it seen fit to do so, might with propriety have questioned appellant relative to the charges he had made against it. The California Court has held that when the integrity of a legislative body, or of its members, is impugned it may lawfully inquire into the subject matter.[6] And there is a state statute making it a misdemeanor for a person summoned as a witness before a legislative committee to refuse to answer material and proper questions.[7]

An individual haled before an inquisitorial body of this type can have no legal ground for complaining of the body's use of its powers even though, as a consequence of the inquisition, the individual be made to suffer serious and unjustified harm to his reputation or his ability to earn a living. But he may have grounds for complaining of an abuse by the body of its powers if such conduct goes so far as to abridge a federally protected right.[8] Ap-

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[6]Ex parte McCarthy, 29 Cal. 395, 404.

[7]Section 9412 of the California Government Code.

[8]Cf. Screws v. United States, 325 U. S. 91; Snowden v. Hughes, 321 U. S. 1.

pellant, it must be remembered, did not stand on equal terms with this Committee. He had the status of a private citizen only, whereas the Committee was armed with the power of the state. In doing what it did here it was at the least acting under color of authority.

Appellant had the constitutional right freely to speak his mind and expose his thoughts. If what he had said in his petition was false and libelous, appellees had the same opportunity enjoyed by other people to seek redress against him in the courts, for, unlike themselves, he possessed no immunity. True, the Committee did not prevent him from exercising his right; he did succeed in making his message public. But the statute in question (§ 43) must be conceded a more liberal range than that. Appellant is entitled not only to exercise the right but to be protected against official reprisal for having exercised it.[9] And considering his pleading as a whole it is rationally possible to believe that the Committee purposely undertook, under an appearance of regularity, to intimidate, punish and oppress him for having done what he did. The precipitate convening of the Committee, the hurried summoning of appellant to attend upon it, the abrupt dispatch of telegrams to prosecuting officials urging the institution of perjury charges, the gross

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[9]Bomar v. Keyes, 2 Cir., 162 F. 2d 136. And cf. Picking v. Pennsylvania R. Co., 3 Cir. 151 F. 2d 240; Burt v. City of New York, 2 Cir., 156 F. 2d 791; Terminiello v. Chicago, 337 U. S. 1 (1949); Douglas v. Jeanette, 319 U. S. 157 (1943).

impropriety of incorporating into the Committee minutes an allegedly false record ascribing to the witness the commission of infamous crimes, all may serve to lend color to the inferences of malicious and purposeful oppression sought to be drawn in the pleading. Even the course of questioning, innocent as it may seem when considered by itself, may be thought a calculated endeavor having no other purpose than that of putting the witness in a situation where he might be prosecuted for a criminal offense.

We express no opinion as to where the truth lies. Our purpose is merely to point out that the alleged circumstances of this case are too ambiguous and complex to warrant judgment on the complaint alone. The motion to dismiss it for insufficiency should have been denied and the defendants required to answer. Nor do we wish to be considered as expressing settled views on the law of the case, other than that pertaining to the consequences of an unwarranted interference, if any there was, with the right of freedom of speech.

The case as against appellee Robinson stands on a different footing. He was not himself acting officially or under color of authority. The complaint alleges that before the service of the subpena and after the content of the circulated petition had become known, appellee Tenney "immediately communicated by telephone with defendant Elmer E. Robinson advising him of the charges contained in said petition and the stated purpose of

the same." Then and there, it is alleged, the two discussed ways and means of best thwarting appellant's charges and defeating their purpose, and agreed that a hearing should be held by the Committee on the following day at which Robinson should appear as a voluntary witness and deny the truth of the charges. It is more than doubtful whether these allegations are sufficient to implicate Robinson in a conspiracy with the Committee to abridge any of appellant's federally protected rights. We are unable to say that the court was in error in dismissing the complaint as to him.

Otherwise the judgment of dismissal is reversed and the cause remanded for further proceedings.

[Endorsed]: Filed June 30, 1950.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12430

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY, et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, as to appellant Robinson, otherwise, the judgment of the said District Court be, and hereby is reversed and this cause be, and hereby is remanded to the said District Court for further proceedings, with costs in this court in favor of the appellant and against the appellees, other than Robinson.

It is further ordered and adjudged by this Court

that the appellant recover against the appellees, other than Robinson, for his costs herein expended, and have execution therefor.

Filed and entered June 30, 1950.

/s/ PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, August 9, 1950.

Before: Healy, Circuit Judge:
Mathes and Driver, District Judges.

[Title of Cause.]

ORDER DENYING PETITIONS FOR HEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed July 27, 1950, and the petition of appellees other than Robinson, filed July 28, 1950, both within time allowed therefor by rule of court, for a rehearing of above cause be, and each of them hereby is denied.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause and Number.]

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred, and forty eight (148) pages, numbered from and including 1 to and including 148, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellees other than Robinson, and certified under Rule 3 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 30th day of August, 1950.

[Seal] PAUL B. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 338

ORDER ALLOWING CERTIORARI—Filed December 11, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

FILED
SEP 27 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities, a Cali-

fornia Legislative Committee, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered on the 30th of June, 1950. (R. 147; 183 F. (2d) 121.)

The United States Court of Appeals for the Ninth Circuit reversed the judgment of the District Court of the United States, in and for the Northern District of California, dismissing the complaint of respondent (R. 125) insofar as it related to petitioners.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Court of Appeals has reversed the judgment of the District Court, dismissing the action brought by the respondent insofar as it relates to petitioners for the failure of the complaint to state a cause for relief.

The complaint of respondent (R. 3-74) sought to recover from petitioners, all of whom were duly elected and qualified members (State Senators) of the State Senate of California, and from Elmer E. Robinson, who was and is the Mayor of San Francisco, California, a defendant but not a petitioner, damages in the amount of $250,000 for alleged violation of his civil rights under and by virtue of the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A.

Summarizing the complaint, it appears that respondent sued under Sections 43 and 47(3) of Title 8

U.S.C.A. to recover damages for alleged violations of his civil rights. The defendants (petitioners) are members of what was known as The Tenney Committee of the California State Senate, empowered by a resolution adopted in 1947 to inquire into un-American activities. The remaining defendant is Mayor Robinson of San Francisco.

The pleading avers: "On January 28, 1949, plaintiff (respondent) *circulated a petition* entitled: 'A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)' among the members of the Legislature of the State of California at the State Capitol in Sacramento. * * * and the purpose of said *petition,* as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff (respondent) was engaged in circularizing said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to wit: January 29, 1949."

The petition and the subpoena are made parts of the complaint and appear respectively on pages 18 and 22, Tr.

It is to be noted that pursuant to a requirement of the State Constitution the Legislature adjourned for a period of thirty (30) days, commencing at 3:00 p.m. on January 29, 1949, and, hence, was in recess at the time fixed for respondent's appearance.

The petition goes on to charge that the Committee had "used" appellant "as an instrument to smear Congressman Franck R. Havenner as a "Red" when he was candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end." The particulars of the charge are lengthy. While respondent was engaged in circulating his protest a subpoena was served upon him directing him to appear as a witness before the Committee on the following day, January 29, at three o'clock in the afternoon. He appeared at that time with his counsel. The Attorney General's Office of the State of California was present, being represented by J. Francis O'Shea, Assistant Attorney General of the State of California, and A. C. Morrison, Deputy Legislative Counsel of the California State Legislature was also present, each of whom advised the Committee during the hearing. Upon being sworn as a witness, respondent gave his name, residence and occupation and then stated to the Committee that he was represented with counsel and would like to act under his advice. Counsel for respondent then commenced to read a copy of the so-called protest above referred to. Thereupon counsel for respondent stated objections to the Committee.

One of the grounds of the objection was that "The purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation." Other grounds were

that respondent had been subpoenaed because of the charges made in his petition to the Legislature; that the Committee was not and could not be a fair and impartial tribunal; that it was engaged in a political and not a legislative investigation in attempting to acquit itself of respondent's charges; that a joint committee of the Assembly and Senate was the only proper body to investigate such charges; and that the Committee had itself vouched for respondent's veracity by releases and reports in the past. The objections were overruled by the Chairman, but respondent was instructed by his counsel not to respond to questioning. The Chairman then inquired of respondent, "Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?"; to which the answer was, "On advice of counsel, I will not, no, sir."

The witness thereupon answered questions relating to his signature to the so-called protest, and then was further interrogated in connection with his acquaintanceship with certain people, to all of which questions he declined to answer. A motion was made to hold the witness in contempt. Thereupon the Chairman of the Committee referred to an affidavit of respondent of December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit respondent among other things admits being a former member of the Communist Party, and specifically that he was induced to become a member of the Communist Party by Frank McCormick and Hugh Bryson in San Francisco, and after joining the Communist Party he car-

ried out Communist activities. Reference was made to other activities of respondent in connection with evidence presented to the Committee. The Chairman thereupon stated for the record that Brandhove had a criminal record, in the course of which he recounted crimes with which he said respondent had been charged in various cities over a period ranging from 1930 to 1947, including, among other things, charges of sodomy, grand theft, burglary, malicious mischief, and defrauding an inn-keeper. This statement is alleged in the complaint to have been false.

Reference was then made by the Chairman to other affidavits made by respondent and to a newspaper article in which one of the affidavits referred to by the Chairman had been characterized by a Mr. Nicholson as "a tissue of lies" and could be so proven.

The respondent was then asked if he was acquainted with Congressman Havenner's secretary. He refused to answer on advice of counsel. He was then asked, "Does the Army Transport Service in San Francisco have a record of your activities?" Again respondent refused to answer on advice of counsel. The interrogation of respondent was then dropped and the witness was permitted to leave the stand. At the same hearing the Mayor of San Francisco Robinson was called and testified at length in repudiation of the charges Brandhove had made against him which appeared in his so-called protest (appearing in R. 18).

During the course of the session the Committee resolved that a complaint be filed in the proper court charging respondent with a misdemeanor in refusing

to answer questions. This course was followed and appellant was arrested on a complaint preferred by the Chairman and was confined in jail from February 1 to February 15, 1949. A trial of the charge before a jury on March 5, 1949, resulted in a disagreement, and the case was dismissed four days later on motion of the district attorney.

Respondent's complaint pieces together these proceedings and incidents, plus the sending by the Committee of two telegrams to the district attorneys of San Francisco and Alameda counties. They refer to Brandhove's charges circulated among the legislators and to sworn testimony of Brandhove earlier given before the Committee, said in the telegrams to be inconsistent or at variance with the charges. The officials addressed are urged to charge Brandhove with perjury or to have the matter presented to the grand jury of their respective counties.

The pleading then alleges (R. 8) that respondent had committed no public offense at said Committee hearing on the grounds that the resolution creating the Tenney Committee if read into a criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949 was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of respondent, to wit, his rights of free speech and to petition the legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that

the purpose or object of said hearing was not disclosed to respondent, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating the Tenney Committee; that the questions asked of respondent at said hearing were not material and proper as required by Section 9412 of the California Government Code.

The pleading goes on to allege that the acts of petitioners above set forth were done or participated in by said petitioners with malice and intent to intimidate and silence respondent and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive respondent.

The complaint then charges that the acts of these petitioners were done under color of the authority conferred upon them by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said Committee.

Allegations in respect to damage concluded the complaint.

We are indebted to the opinion of the Circuit Court of Appeals in a large part for the present summarization of the complaint.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28 U.S.C.A. (Judicial Code and Judiciary), which in its pertinent language provides:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The date of the judgment of the Court of Appeals herein sought to be reviewed was June 30, 1950 (R. 147).

III.

THE QUESTIONS PRESENTED.

Petitioners present to this Court the question of whether the Court of Appeals was in error in failing to affirm the judgment of the District Court in dismissing the complaint of respondent. The specific question of law here presented may be stated as follows: Does the complaint in the present action state a cause of relief under the Civil Rights Act? This question may only be answered by considering and correctly determining:

(a) Does the judiciary have the power to inquire into the motives of the legislative branch of the State Government?

(b) Does the Constitution of the United States secure to the respondent a right to petition the Legislature of the State of California?

(c) Is the State Legislature of the State of California and its members liable to damages under the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A. when acting in discharge of their duties as state legislators?

IV.

STATUTES INVOLVED.

Section 43, 8 U.S.C.A.:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 47(3), 8 U.S.C.A.:

"If two or more persons in any State or Territory conspire * * *, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or

Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

V.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. Certiorari should be granted because the Court of Appeals in the instant case has decided an important federal question in a way probably untenable and in conflict with applicable decisions of this Court, namely, that the judiciary has not the power to inquire into the motives of the Legislative Branch of the Government in the following cases:

McGrain v. Daugherty, 273 U.S. 135;
Marshall v. Gordon, 243 U.S. 521;
McCray v. United States, 195 U.S. 27;
Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. City of Watertown, 130 U.S. 301, 319;
Soon Hing v. Crowley, 113 U.S. 703, 710;
New Orleans v. Warner, 175 U.S. 120.

2. Certiorari should be granted because the Court of Appeals in the instant case decided an important question and has rendered a decision probably untenable and in conflict with the decision of other United States Courts of Appeals to the effect that the judiciary has not the power to inquire into the motives of the Legislative Branch of the Government:

Dennis v. United States, 171 F. (2d) 986;
Eisler v. United States, 170 F. (2d) 273;
Townsend v. United States, 95 F. (2d) 352;
Hearst v. Black, 87 F. (2d) 68.

3. The Court of Appeals in the instant case has rendered a decision which conflicts with its own decision in the following cases:

Allen v. Markham, 156 F. (2d) 653, 660;
Alpers v. City and County of San Francisco, 32 Fed. 503.

4. Certiorari should be granted because the Court of Appeals reversed the trial Court upon the important question of whether the right to petition a state legislature on a matter purely of state concern is a right guaranteed under the Constitution and laws of the United States. The decision of the Circuit Court on this subject is probably untenable and in conflict with the weight of authority.

5. Ceritorari should be granted because members of the State Legislature are not liable in damages for acts done in discharge of their duties as State Legislators.

Kilbourn v. Thompson, 103 U.S. 168, 201;

2 *Cooley's Constitutional Limitations,* 8th Ed. p. 929;

Cushing, *Law and Practice of Legislative Assemblies,* Section 5602;

Constitution of the United States, Article IV, Section 4.

6. Certiorari should be granted because of the importance of the problem in the administration of the Civil Rights Act and the orderly administration of state government.

PRAYER FOR WRIT.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit, commanding the Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals in the case numbered and entitled on its docket No. 12430, William Patrick Brandhove, Appellant v. Jack B. Tenney; the Senate Fact-Finding Committee on Un-American Activities, a California Legislative Committee; Hugh M. Burns; Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton; Clyde A. Watson and Elmer E. Robinson, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by statutes of the United States; and that the judgment of the said Court of

Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, San Francisco, California,
September 25, 1950.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
FRED N. HOWSER,
Attorney General of the State of California,
C. J. SCOTT,
Assistant Attorney General of the State of California,
RALPH N. KLEPS,
J. D. STRAUSS,
A. C. MORRISON,
Attorneys for Petitioners.

Certificate of Counsel

I hereby certify that I am one of the petitioners' attorneys in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 25, 1950.

Harold C. Faulkner,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit rendered on June 30, 1950 appears on page 137 of the Transcript of Record, also 183 F. (2d) 121.

II.

JURISDICTION.

The petitioner adopts the reasons stated in the petition for writ of certiorari (pages 11-13 hereof) as supporting the jurisdiction of this Court.

III.

STATEMENT OF THE CASE.

The petitioners adopt the "Summary statement of the matter involved", appearing in the petition for writ of certiorari (pages 2-9 hereof) as a statement of the case for the purposes of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in reversing the judgment of the District Court.

2. The Court of Appeals erred in holding that the complaint stated a claim for relief under the provisions of Section 43 and 47(3) of Title 8 U.S.C.A.

3. The Court of Appeals erred in holding that the judiciary may inquire into the motives of the Legislature of the State of California and of its committees while acting in the discharge of their duties as such.

4. The Court of Appeals erred in holding that acts of a legislative committee of the Legislature of the

State of California lawful in and of themselves, when tested by the laws of the State of California and of the United States, may constitute an abuse of power because of the motives of the members of the committee.

5. The Court erred in holding that the conduct of the petitioners deprived respondent of a federally protected right.

6. The Court of Appeals erred in holding that the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A. applied to the official acts of the legislative committee of a State Legislature.

7. The Court of Appeals erred in holding that the circulation of a petition by a citizen of the State of California among members of the Legislature of the State of California seeking to induce the Legislators not to appropriate funds for a legislative committee was a right, privilege or immunity secured to the citizen of the State by the Constitution and laws of the United States.

8. The Court of Appeals erred in holding in effect that the complaint charges that the respondent was deprived of a right, privilege or immunity secured to him by the Constitution and laws of the United States, when the right, privilege or immunity, if existent theretofore, admittedly had been exercised by respondent.

V.

ARGUMENT.

In reversing the decision of the District Court, the Court of Appeals has rendered a decision, the rationale of which and the effect of which in the case rendered may permit a Court or a jury to speculate upon what the motives of a committee of a state legislature may have been at the time its members were acting in the discharge of their duties as state legislators. It must be borne in mind that the Court of Appeals has indicated that the present Committee was a legally constituted committee, that it had the power to inquire of the respondent on the subjects concerning which inquiry was made, and that it had the power to inquire of Brandhove on the subject of the charges contained in his petition to the Legislature. Having reached its conclusion in these respects, petitioners claim the case should have ended. The Court of Appeals went a step further and held that if the actions of the Legislature are such that they show a motive to punish the respondent for having exercised a federally protected right, its conduct thus becomes actionable.

The present case further poses this question, the importance of which to the administration of state government is obvious. Are legislators to continue to be answerable for acts within their power and authority only to the people, or are they henceforth to be compelled to defend themselves in Court against attack from persons claimed to be aggrieved in the denial of federally protected rights admittedly exercised by conduct of state legislators within the scope

of their power on a mere allegation that they were actuated by malice and intent to intimidate? To illustrate: Are the members of a state legislature to be hereafter liable in damages because they voted for the passage of a statute at a later time declared unconstitutional because an aggrieved person claimed the legislator was actuated by malice in his vote?

The Civil Rights Statute was never enacted for the purpose of permitting a cause of action for damages under the facts and circumstances of this case. Construction which would so hold should be avoided.

The case presents fundamental questions of constitutional law pertaining to the relationship between the Federal and State governments and to the respective powers of the Courts and the Legislature.

This is a case of first impression in the following respects:

This is the first case in which it has been held that the right to petition a state legislature is a right secured to the citizen by the Constitution of the United States.

This is the first case in which it has been held that the lawfulness or unlawfulness of legislative acts depends solely upon the motive of the members of the legislature.

This is the first case in which a citizen of a state who has exercised his right as a citizen of the state to petition a state legislature with respect to a purely state matter has asked for and, by the ruling of a Court has obtained, the intervention

of a United States Court to compel state legislators to justify their conduct and answer in damages for conduct in the performance of their lawful functions.

A.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT.

The Court of Appeals declares:

"* * * a jury or judge may conclude from the showing that the Committee did no more than make legitimate use of the power conferred upon it. The questions put to appellant, taken by themselves, seem to be unobjectionable, and they bear substantial relation to the general subject the Committee was empowered to inquire into. In these inquiries, too, it is possible to discern a purpose on the Committee's part of determining whether sworn information appellant had formerly given the Committee might still be relied on as true, or whether it should now be disregarded as false. We think, also, that the Committee, had it seen fit to do so, might with propriety have questioned appellant relative to the charges he had made against it. The California Court has held that when the integrity of a legislative body, or of its members, is impugned it may lawfully inquire into the subject matter. And there is a state statute making it a misdemeanor for a person summoned as a witness before a legislative committee to refuse to answer material and proper questions."

The court or jury, if this case is required to go to trial, must under this decision in reaching a conclusion on whether the petitioners did more than make legitimate use of the power conferred upon it, pass upon and determine its motives. It appears from the complaint and from the opinion of the Court of Appeals that the Committee was exercising a lawful power in a lawful manner. The only basis upon which a contrary conclusion could be reached is that the Court may inquire into the motives of the members of the Committee. This, we respectfully urge, the Court acting with judge or jury is not permitted to do under the law.

The creation of the Committee was within the constitutional powers of the Legislature.

Vern Smith v. The People of the State of California, 336 U.S. 957.

It has been held uniformly in many cases to be hereinafter cited that the Federal Courts have no power to inquire into the motives of committees created by Congress once it has been determined that the committees were created within the constitutional powers of the Congress and the scope of the inquiry of the Committee did not exceed the limits set by a possible legislative purpose.

If it be suggested that the cases to be cited are dissimilar because they do not involve the Civil Rights Acts it should be noted at the outset that the Court in this case and the Courts in the cases to be cited were all asked to find the action of the committees unconstitutional because their actions infringed upon the

right of individuals secured by the First Amendment of the Constitution.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Acts. Thus, the power of the Court to inquire into the motives of the legislative committee is no greater than the power of the Court to inquire into the motives of the Committee created by Congress.

In *Dennis v. United States*, 171 F. (2d) 986, 988 the Court stated:

> "Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

In the case of *Eisler v. United States*, 170 F. (2d) 273, 278 the Court stated:

> "During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appel-

lant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees."

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States,* 167 F. (2d) 241, 250, in which case the Court stated:

"Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States,* citing *Hearst v. Black.* The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and perti-

nency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive."

In the *Townsend* case cited by the Court (*Townsend v. United States*, 95 F. (2d) 352, 361, the Court stated:

"Because a witness could not understand the purpose of a cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* Hearst v. Black, 66 App. D.C. 313, 87 F.2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is

bound rightly to construe the statute. Sinclair v. United States, supra, 279 U.S. 263, at page 299, 49 S.Ct. 268, 273, 73 L.Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. McGrain v. Daugherty, supra, 273 U.S. 135, at pages 175, 176, 47 S.Ct. 319, 329, 71 L.Ed. 580, 50 A.L.R. 1. He cannot be heard to plead justification and, hence, lack of ~~willfulness~~ in defiantly leaving a hearing because he does not like the questions propounded to him—remedy by objection and refusal to answer both being open to him." (Italics added.)

In the case of *Hearst v. Black,* also cited by the Court in the *Barsky* case (*Hearst v. Black,* 87 F. (2d) 68 at pages 71 and 72), the Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference. The Constitution has lodged the legislative power exclusively in the Congress.* If a court could say to the Congress that it could use or could not use information in

its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.'* Springer v. Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 482, 72 L.Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. City and County of San Francisco*, 32 Fed. 503, 506 (Circuit Court, Northern District, California, 1887) in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient adminis-

tration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works Co. v. City of New Orleans,* 164 U.S. 471, in which it was stated in an opinion by Justice Harlan:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a

municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption."

The Court in the *Barsky* case also relied upon the historical case of *McGrain v. Daugherty*, 273 U.S. 135.

At page 175 the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee affords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or to the right of writ of habeas corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and

> of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In Re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon*, 243 U.S. 521, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Congress to punish for a contempt for an obstruction of the exercise of the legislative power:

> "And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

The decisions cited and quoted above are founded upon and are applications of the rule prevailing with

respect to the legislative enactments, for it has been held without exception that the judiciary cannot inquire into the motives of the legislature in the enactment of legislation.

14 *Am. Jur.* 399;

11 *Am. Jur.* 818;

1 *Cooley's Constitutional Limitations,* 8th Ed. 379.

The following language from the opinion of Chief Justice White in *McCray v. United States,* 195 U.S. 27, 54, is quoted with approval by Cooley:

> "It is * * * argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end

> to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * * It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The Supreme Court of the United States has not distinguished between Congress or the legislative bodies of the respective states of the Union in refusing to consider the wisdom, need and appropriateness of legislation or the motives of the legislature in the passage of laws.

Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. City of Watertown, 130 U.S. 301;
Soon Hing v. Crowley, 113 U.S. 703;
New Orleans v. Warner, 175 U.S. 120;
Sonzinsky v. United States, 300 U.S. 506;
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381;
Mulford v. Smith, 307 U.S. 38.

The Court of Appeals for the Ninth Circuit has also followed this general rule in the case of *Allen v. Markham,* 156 Fed. (2d) 653, 660.

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into the motives of the legislative departments of the Federal or of the State governments; that the power of the Court in this case can be no greater than the power of the Courts to inquire into the motives of the Congressional Committees for the only justification for such inquiry would be the application of the provisions of the First Amendment to the Constitution of the United States in the one case directly and in the other case by virtue of the provisions of the Fourteenth Amendment and the Civil Rights Acts. The Fourteenth Amendment and Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State. It is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

The *Eisler* case and the *Barsky* case hold flatly that the judicial power may not be used to scrutinize the motives of the committee upon an attack almost identical with the one made here.

The Court of Appeals here has held that the action of a legislative committee, making legitimate use of the power conferred upon it, may become unlawful by scrutinizing and inquiring into the motive actuating the Committee in the performance of its acts.

Thus the holding here is in direct conflict with the holding in the cases cited.

The purpose of the investigation of un-American activities of necessity involves freedom of the press, freedom of speech, freedom of assembly. When the speech and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating may, under the decision of the Court of Appeals in this case, face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble and that the act was actuated by malice. The holding of the Court of Appeals that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself), may be scrutinized by the judicial branch of the government is not within the power of a Court under a republican form of government.

The decision of the Court of Appeals passes this point, that goes to a "basic and vital" power of a legislature to act independently of the judiciary on matters within the scope of the legislature's power, without discussion or even comment.

We respectfully urge that the legislature of the State of California is entitled to have this point determined. It is vital to its own existence.

Incidental to this subject, the holding of the Court of Appeals above discussed completely ignores the fundamental rule in civil law, namely, that well-expressed rule in the following quotation from 54 *C.J.S.* 915:

> "Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful."

B.

THE RIGHT CLAIMED BY RESPONDENT TO BE INVADED WAS "THE RIGHT TO PETITION THE LEGISLATURE".

The complaint unequivocally alleges that the act done by respondent (and the right claimed to have been infringed) was the circulation of a petition among the Legislators of the State of California.

The right to petition the government for a redress of grievances is a separately stated right under the First Amendment of the Constitution of the United States, which reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The right becomes a separate section of the Constitution of the State of California.

Article I, Sec. 9 of the Constitution of the State of California provides:

"Liberty of Speech and of the Press.

Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

Article I, Sec. 10 of the Constitution of the State of California provides:

"Right to Assemble and to Petition.

Sec. 10. The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

The right to petition is distinct and separate from the right to assemble.

The complaint in the instant case uses the phrases, "Freedom of Speech," "Equal Protection of the Law," "Due Process of the Law," "Infringement of Equal Privileges," and "Immunity as a Citizen of the United States," but the act done claimed to have been infringed is specifically charged as the act of petitioning the Legislature of the State of California on a matter completely unrelated to the Federal government and relating solely to a matter of legislative concern and particularly the internal organization and procedure of the Legislature in this, whether it should

by appropriation continue the existence of the Committee on un-American activities. This right the Court of Appeals held in its opinion had actually been exercised by respondent.

C.

RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT ONE SECURED TO RESPONDENT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

Although the right to petition the government is a fundamental one it is a right limited to the "citizen" not the individual. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California but rather secured to the citizens of each sovereign by the Constitutions thereof.

United States v. Cruikshank, 92 U.S. 542, 552.

Being an attribute of "citizenship" it necessarily follows that the right of a citizen of the United States to petition his *government* differs from the right of a citizen of the State of California to petition *the legislature*.

Hence the right of a citizen of California to petition the State Legislature is not one secured to him by the Constitution or laws of the United States and is subject only to State jurisdiction.

United States v. Cruikshank, supra, p. 551.

It is only the right to petition the United States Government which being an attribute of national

citizenship is secured and protected by the Constitution of the United States.

United States v. Cruikshank, supra.

See, also;

Crandall v. State of Nevada, 73 U.S. 35, 44.

There is nothing to the contrary to be found in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, for there the assemblies sought to be eliminated were for the purpose of discussing National rather than State legislation.

> "The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Section 1 of the Fourteenth Amendment; and whether R.S. Sec. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge."

We respectfully submit that the present decision is in conflict with the reasoning, holding and cases cited by the same Court of Appeals in its opinion in *Hardyman et al. v. Collins et al.*, 183 F. (2d) 308, decided May 29, 1950, which is bottomed upon the proposition that the meeting involved was for the purpose of petitioning the Federal government on matters of Federal concern.

The Fourteenth Amendment is the Constitutional authority for the Civil Rights Acts; the extent of their application is limited by the scope of the Amendment.

United States v. Cruikshank, supra.

Not only is the right to petition the State Legislature not one of the rights set out in the Bill of Rights, but it is also true that the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights.

These rights are many, here are a few:

Right to trial by jury in a State Court. *Tompsett v. State of Ohio,* 146 F. (2d) 95.

Freedom from unreasonable searches and seizures. *United States v. Crosby,* 1 Hughes 448, Fed. case No. 14,893.

Right to indictment by Grand Jury. *Maxwell v. Dow,* 176 U.S. 581.

Prohibition against self-incrimination. *Adamson v. California,* 332 U.S. 46.

Right to be charged by indictment in felony cases. *Hurtado v. California,* 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the national and state power. As stated in the *Adamson* case, supra, at pages 1677 and 1678:

"The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of

the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243, 8 L.Ed. 672; Feldman v. United States, 322 U.S. 487, 490, 64 S.Ct. 1082, 1283, 88 L.Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The Slaughter-House cases decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. Maxwell v. Bugbee, 250 U.S. 525, 537, 40 S.Ct. 2, 5, 63 L.Ed. 1124; Hamilton v. Regents, 293 U.S. 245, 261, 55 S.Ct. 197, 203, 79 L.Ed. 343. This power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in Twining v. New Jersey, 211 U.S. 78, 91-98, 29 S.Ct. 14, 16-19, 53 L.Ed. 97. 'The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.' The Twining case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the

national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. Twining v. New Jersey, supra, 211 U.S. at pages 98, 99, 29 S. Ct. at page 19, 53 L.Ed. 97; Palko v. Connecticut, supra, 302 U.S. at page 328, 58 S.Ct. at page 153, 82 L.Ed. 288. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States*, 238 U.S. 347:

"Beyond doubt the Amendment does not take away from the state governments in a general

sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

cf. *Breedlove v. Suttles,* 302 U.S. 277.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle, namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state not national citizenship and is not secured a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1.

It will be observed that the present case was cited without even a reference to the principles of law above discussed.

D.

THE STATE LEGISLATORS OF CALIFORNIA ARE EXEMPT FROM CIVIL LIABILITY.

Section 4 of Article IV of the Constitution provides, among other things, as follows:

> "The United States shall guarantee to every state in this Union a republican form of government * * *."

As part of a republican form of government it is unquestioned "that all of the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial." The privileges secured to members of the legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is *Kilbourn v. Thompson,* 103 U.S. 168. The discussion on this interesting subject starts on page 201. In reading this case, we suggest that the language of Mr. Chief Justice Parsons, quoted with approval, be considered. Again with approval, the Supreme Court quotes the following:

> "Mr. Justice Story (sec. 866 of his Commentaries on the Constitution) says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right.'"

See also:

Collins v. Riley, 24 Cal. (2d) 912, 915;
Ex parte McCarthy, 29 Cal. 395;
Hearst v. Black, supra;
United States v. Bryan, 72 F. Supp. 58;
Cochran v. Couzens, 42 F. (2d) 783;
Spalding v. Vilas, 161 U.S. 483;
2 Cooley's Constitutional Limitations, 8th Edition, 929;
Cushing, Law and Practice of Legislative Assemblies, Sec. 5602.

We urge to the Court:

1. That a member of the State Legislature of California is immune from civil liability for acts done during the performance of his legislative duty.

2. That when it is determined that the meeting was within the power of the Committee to call and that the subpoenaing of respondent was within its power, state legislators are immune from civil liability for their acts during the course of the meetings lawfully held.

3. That the right of respondent stems from a statute; the immunity of the Legislature stems from the Constitution. Under these circumstances the constitutional rights of the legislators are paramount.

4. That a construction of the Civil Rights Act as paramount to the right of members of the State Legislature implicit in a Republican form of government and also derived from the Constitution of the United States is unconstitutional and void.

E.

CONCLUSION.

Fundamental and vital legal questions are involved in this petition for writ of certiorari. A decision with respect to them was implicit in the judgment of the Court of Appeals although none of them were even referred to in the opinion much less discussed or expressly recited, namely:

1. The judiciary has not the power to inquire into the motives of the legislative branch of the government.

2. The right to petition to the California Legislature is not one secured to either a citizen of the United States, a citizen of the State of California or a person within the jurisdiction of the United States by the Constitution or laws of the United States.

3. State Legislatures are immune from civil liability under the provisions of Sections 43 and 47(3) Title 8 U.S.C.A.

The impact of the judgment of the Court of Appeals upon the Legislature of the State of California and the legislative bodies of every other state of the Union is obvious. The questions decided by the Court of Appeals in this case cannot help but have a serious effect on the right of the people to elect representatives and the right of the people to expect their elected legislative representatives to execute the functions of their office and it cannot help but deter the legislative representatives of the people in the State of California

and the other states of the Union in the execution of the functions of their office for they cannot act without fear of civil prosecution at the very least at the hands and at the instigation of every malcontent.

The Court of Appeals has decided that the motives prompting lawful acts of State Legislators acting as such may be inquired into by the judiciary. The authorities seemed uniform to the contrary until this decision.

For the foregoing reasons, it is respectfully submitted that the writ should issue.

Dated, San Francisco, California,
September 25, 1950.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 338

CK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

ILLIAM PATRICK BRANDHOVE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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In the Supreme Court
OF THE
United States

October Term, 1950

No. 338

Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities (a California Legislative Committee), Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson,

Petitioners,

vs.

William Patrick Brandhove,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, William Patrick Brandhove, herewith submits his brief in answer to Petitioners above named, as follows:

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-126) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121.

JURISDICTION.

The jurisdictional requisites are adequately set forth in Petitioners' Brief p. 2.

QUESTIONS PRESENTED.

The sole question presented is whether Respondent's complaint states a claim for relief against Petitioners under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

In the light of Petitioners' contentions, the following subordinate questions will be discussed:

1. Do Sections 43 and 47(3), 8 U.S.C. impose civil liability where under color of State law a reprisal or punishment has been inflicted on one

who has exercised a federal right secured by the Constitution and laws of the United States?

2. Are State legislators immune from civil liability under the Civil Rights Statutes?

3. Was Respondent in circulating a petition for redress of grievances among the members of the California Legislature, protected under the rights of petition and free speech guaranteed in the First Amendment as transmitted into the Fourteenth Amendment of the United States Constitution?

4. Was Respondent denied due process of law by Petitioners?

5. Was Respondent denied the equal protection of the laws by Petitioners acting in conspiracy?

6. Were privileges and immunities of Respondent abridged by Petitioners?

7. Can a State legislative committee and its members escape the scrutiny of the Federal Courts where facts are alleged to show a conspiracy under color of State law to violate fundamental Federal Rights?

8. Is the California Senate Resolution (R. 12) creating the Senate Fact-Finding Committee on Un-American Activities unconstitutional for lack of definiteness and certainty as applied to the facts pleaded in Respondent's complaint?

9. Is Respondent entitled to trial on his complaint?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra,* pp. i-iii.

STATEMENT.

Respondent filed a complaint in the District Court against Petitioners and one Elmer E. Robinson for general, special and punitive damages in the sum of $250,000.00 (R. 3). The complaint was under the Civil Rights Statutes (Rev. Stat. Sections 979, 1980; 8 U.S.C. Sections 43, 47 (3); Appendix A *infra* pp. i-ii) and alleges acts done or participated in by Petitioners and Robinson:

> "with malice and intent to intimidate and silence plaintiff [Respondent] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the [California] legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff [Respondent]." (Complaint par. 13; R. 10).

The complaint further alleges that Petitioners acted in conspiracy and under color of State law (Complaint par. 14; R. 10) and that Robinson participated in the conspiracy (Complaint par. 14; R. 10).

As disclosed by the record, Respondent's complaint is predicated upon the following sequence of events therein pleaded:

On January 28, 1949, Respondent, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State Capitol in Sacramento (R. 4, 18-22). The subject matter of said petition was stated therein as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end" (R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (R. 19-20), and the stated purpose of said petition was to persuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (R. 5, 18-22).

While Respondent was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949 (R. 5, 22-23). No reference was made in said subpoena to the purpose or object of such hearing, or of the testimony required thereat (R. 5, 22-23). Before the service of

said subpoena on Respondent, but after the content of said circulated petition had become known to Petitioner Tenney, said Petitioner, the chairman of the criticized committee, discussed with Robinson the best ways and means of thwarting the charges contained in said petition and defeating the purpose thereof, and they then and there agreed that the aforementioned hearing should be held, and that Robinson should appear at said hearing as a voluntary witness to deny the truth of the contents of Respondent's petition (R. 5-6, 45-47).

On the same day, to wit, January 28, 1949, and in order to silence Respondent and defeat the effect of his said petition, Petitioners Tenney and Burns, chairman and vice-chairman respectively of The Tenney Committee, dispatched State telegrams to two District Attorneys of the State of California, referring to Brandhove's petition and demanding on behalf of said Committee that Respondent be prosecuted for perjury (R. 6, 23-25).

A hearing was held by The Tenney Committee on January 29, 1949, at which all Petitioners were sitting as members of said Committee, and at which Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness (R. 6, 27-28, 47). At said hearing Robinson was permitted to make a lengthy unsworn statement first (R. 7, 45-48) and after having been sworn, was given unbridled discretion by the Committee in conducting a self justification of the charges contained in respondent's petition (R. 7, 50-67). Pursuant to the subpoena served upon

him, Respondent appeared at said hearing and after answering questions as to his identity (R. 28) objected to the committee's further questions on the grounds, among others, that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in Respondent's petition to the California Legislature and was therefore then acting as judge and accused in the same case, thereby exceeding its power and jurisdiction (R. 8, 28-32, 35-38). All objections were overruled by The Tenney Committee (R. 32) and Respondent was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him (R. 7, 38-41, 42-43). At said hearing Petitioner Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of Respondent and a newspaper article wherein an affidavit of Respondent was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to Petitioner Tenney "that Mr. Brandhove (Respondent) was a liar" (R. 7, 43-45, 74). Furthermore, at said hearing Respondent's counsel, although he was not summoned, was called as a witness by said Committee and interrogated at length about his schooling and private affairs, and when he referred to decisions of the United States Supreme Court supporting the objections raised by Respondent against said hearing and supporting Respondent's refusal to answer questions thereat, said counsel was threatened

with expulsion from the hearing room (R. 7-8, 48-50, 34-35). At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of Respondent's refusal to answer questions thereat (R. 8, 42). Such complaint charging Respondent with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by Petitioner Tenney was filed on January 31, 1949, in the Municipal Court of the City of Sacramento (R. 8, 74). Upon said complaint, Respondent was arrested and imprisoned from February 1st to February 15th, 1949 (R. 8). Respondent was tried with jury on said complaint from February 28, 1949, to March 5, 1949, with the result that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction (R. 9). On March 9, 1949, by motion of the prosecuting attorney the charge was dismissed and the Respondent discharged. Respondent committed no public offense by refusing to answer questions at said hearing since the questions were not material or proper as required by section 9412 of the California Government Code (R. 8-9) and the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution, the California law and the resolution creating The Tenney Committee (R. 12).

After his discharge Respondent brought this suit for damages under the Civil Rights Statutes, basing his

claim for relief upon his having been deprived by Petitioners and Robinson of fundamental federal rights.

Upon Petitioners' and Robinson's motions to dismiss the complaint (R. 76-85, 89-97) the District Court made its order granting said motions (R. 124-125) and entered judgment dismissing Respondent's action on the merits (R. 125-126).

On appeal from the judgment of the District Court (R. 126) the Court of Appeals for the Ninth Circuit reversed the judgment with remand as to Petitioners and affirmed the judgment with regard to Robinson (R. 137, 183 F. (2d) 121).

SUMMARY OF THE ARGUMENT.

The present action is based upon intentional abuse by State authority to deny a political opponent: (1) The right to petition his legislature for redress of grievances; (2) the right of free speech; (3) the right to a fair and impartial hearing in matters concerning his person, privacy, opportunity to earn a living, and his honor; and (4) the equal protection of the laws. For these infringements of secured federal rights, Respondent is entitled to damages both under Section 43 and Section 47 (3), Title 8, U.S.C.

Under Section 43, Respondent relies upon the fact that Petitioners acted under color of State law. They acted as members of the California Senate Committee on Un-American Activities, which committee was

created by a resolution of the California State Senate and under which the Committee is given blanket authority to investigate into subversive activities. The fact that the members of that Committee are acting in their capacity as members of the California legislature does not confer immunity upon them to violate the federal rights of another. The legislature is an organ of the State no less than the judicial or executive branch of the State government; and the State cannot vest immunity from liability under the Civil Rights Statutes in any of its agencies of State power.

In exercising his right to petition for discontinuance of said Committee, Respondent addressed himself to the proper authority—the California legislature. Petitioners acted in conspiracy to intercept Respondent's exchange of ideas with his legislature, thus preventing and hindering the legislature from considering and taking action on Respondent's petition. The right to petition the government for redress of grievances, historically and on principle, includes the right to be free from molestation, suppression, chicanery, and subsequent punishment for the exercise of the right.

Under the Fourteenth Amendment, the right to petition as transmitted from the First Amendment, involves the right of a citizen of a State to submit petitions to his own legislature without embarrassment or fear of subsequent reprisal.

Infringement of the right to petition for redress of grievances necessarily involves infringement of the exercise of the right of free speech. The right of peti-

tion is merely a specially emphasized and precious part of the right to speak freely. The right of free speech protects the speaker against prior restraint, suppression, and subsequent punishment, all of which were present here.

Respondent's right to due process of law secured by the Fourteenth Amendment was violated by Petitioners. Such violation must be considered in conjunction with the abridgement of Respondent's First Amendment rights, as well as apart therefrom. The concept of due process requires the maintenance of minimal standards of fundamental justice and fair play. These standards were here grossly disregarded. The Committee acted as judge and accused in the same cause. Its partiality found expression prior to the hearing in question by dispatch of State telegrams to State prosecutors, demanding indictment of Respondent for perjury, and by conspiracy with the star witness antecedent to the hearing. During the hearing, the Committee asked questions which were obviously improper since it had the answers thereto previously obtained from Respondent. The Committee disregarded the right of advocacy in its treatment of Respondent's counsel—this, with a view to intimidation of Respondent as well as counsel. By reading into the record of the hearing a false alleged criminal record attributed to Respondent and other deprecatory matters, the Committee traversed all appropriate standards of fairness and impartiality. A citation of Respondent for contempt based upon this hearing was entirely unlawful and resulted first in Respond-

ent's arrest and imprisonment thereon, and finally his discharge after jury disagreement (eleven for acquittal, one for conviction).

The denial of equal protection of the laws to Respondent by purposeful, arbitrary and discriminatory treatment here pleaded is closely analogous to *Niemotko v. Maryland,* 95 L. Ed. Adv. Op. 237, 239, with the difference that the elements of acting as judge and accused in the same cause, of vilification of the proponent, and of intimidation of proponent by the base treatment of his counsel—violations of due process—are present here while absent in the *Niemotko* case.

For the aforesaid reasons relating to the denial of equal protection of the laws, Petitioners are also liable in damages under Section 47 (3), Title 8, U.S.C.

In giving a claim for relief in damages to persons whose privileges or immunities have been abridged or infringed, Congress in Section 43 and Section 47 (3) made certain that any favorable position secured to a citizen under federal law, is within the protection of these sections, whatever the import of the same words used in the Fourteenth Amendment to the United States Constitution.

The California Senate resolution creating The Tenney Committee violates the due process clause of the Federal Constitution, Amendment Fourteen, in that it lacks the degree of certainty which is required in a statute or other rule of State law, as applied to Respondent's complaint of violation of fundamental federal rights.

In any event, Respondent's complaint which properly pleaded purpose, object and malice, as to Petitioners' conduct, could not be summarily dismissed on motion; Respondent is entitled to go to trial on his complaint.*

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*While this brief was in the process of printing, a brief by twenty-two States Attorneys General as amici curiae in support of Petitioners was served upon Respondent's counsel. This amici curiae brief seeks to raise issues other than those raised by Petitioners in their application for a writ of certiorari. We think that if such issues were properly raised, the Court would not reach them in this case. We rely, however, on the firmly established rule that what has not been raised on the certiorari petition cannot be later raised before this Court. The fact that Respondent cannot at this hour redraft his brief, illustrates in the particular case the wisdom of the rule.

There is, furthermore, no reason for Respondent to argue with amici curiae about the vagueness of the conduct upon which civil liability is predicated under the Civil Rights Statutes.

As to the Equal Protection Clause, Mr. Justice Rutledge, in *Screws v. United States*, 325 U.S. 91, 113, 123, observes as follows:

> "Certainly 'the equal protection of the laws', guaranteed by the Amendment, is not more vague and indifferent than many rights protected by other commands."

As to the Due Process Clause of the Fourteenth Amendment, Respondent does not rely, insofar as free speech and freedom of petitioning are concerned, on the general scope of that clause, but upon the First Amendment as read into the Fourteenth Amendment.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First becomes its standard." (*West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 639.)

Insofar as Respondent relies upon the Fourteenth Amendment as independent from the First Amendment, Petitioners' actions as pleaded, shockingly deviated from elementary rules of American fair play known to any reasonable person, to say nothing of State legislators entrusted with investigating what is un-American in the activities of others.

I.

RESPONDENT'S COMPLAINT IS WITHIN THE PURVIEW OF SECTIONS 43 AND 47 (3) OF TITLE 8 U.S.C. (CIVIL RIGHTS STATUTES).

By enacting Section 43 of U.S.C. Title 8, Congress gave a claim for relief sounding in tort to every individual within the jurisdiction of the United States whose federal rights are infringed by any person acting under color of state law.

Hague v. C.I.O., 307 U.S. 496;
United States v. Classic, 313 U.S. 299;
Screws v. United States, 325 U.S. 91;
Picking v. Penn. Ry. Co., 151 Fed. (2d) 240;
Gordon v. Garrson, D.C. Ill. (1948) 77 F. Supp. 477.

Petitioners contend that persons clothed with state authority are not liable in damages under Section 43 if they have used the state authority vested in them for a *reprisal or punishment* of one who has exercised a federal right secured by the Constitution and laws of the United States (Brief for Petitioners, page 56).

Such construction of Section 43 emasculates the protection of federal rights which Congress intended by the enactment. Under Petitioners' suggested construction, a state official could evade the sanctions of the section by punishing a citizen for having exercised a secured federal right and thereby effectively intimidate the person punished, as well as others, by creating an atmosphere in which fear of subsequent reprisal prevents the free exercise of the right. In the light of the evils aimed at by the enactment, the sug-

gested construction is erroneous; it would open the door wide for the exercise of state power in derogation of federal rights and subject guaranteed federal rights to abuse of state power which abuse Congress expressly intended to check.

Bomar v. Keyes (2 C.A.), 162 Fed. (2d) 136.

Moreover, in their suggested construction, Petitioners overlook the content of important federal rights, such as the right to speak freely and the right to petition the government for redress of grievances here involved. These rights include *freedom from prior censorship and subsequent punishment or reprisal,* as well as protection of the speaker while he is actually engaged in the physical process of disseminating his ideas.

See:

American Communications Association v. Douds, 339 U.S. 382, 396;

Terminiello v. City of Chicago, 337 U.S. 1, 4;

Cases collected, Annotation 93 L. Ed. 1151, 1153, 1154.

In relying on Section 47 (3), Respondent points out that the equal protection of the laws was denied him by Petitioners acting in conspiracy, and also, that such conspiracy was for the purpose of preventing and hindering the California Legislature from according him equal protection of the law with regard to his petition.—Violations of two express prohibitions of Section 47 (3).

Sections 43 and 47 (3) are *in pari materia* with the penal provisions of sections 241 and 242, Title 18

U.S.C. (formerly sections 51 and 52)[1] of which section 241 provides for criminal liability "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, *or because of his having so exercised the same*" (emphasis added).

Section 242 provides penal sanctions for one who "under color of any law * * * subjects any inhabitant of any state, territory or district to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States * * *"

Since Petitioners, under the allegations of Respondent's complaint, are within the scope of penal provisions designed to protect civil rights, their contention imputes to Congress an intent to punish such conduct but to deny indemnification to the injured party. This suggestion cannot be reconciled with the Congressional intent that the person injured be made whole for the unlawful conduct of his oppressors.

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[1] *Screws v. United States*, 325 U.S. 91, 99;
Picking v. Penn. Ry. Co., 151 F. (2d) 240;
Gordon v. Garrson (D.C.Ill., 1948), 77 F. Supp. 477.

II.

RESPONDENT'S COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE PROVISIONS OF SECTION 43 OF TITLE 8 U.S.C.

A. THE ACTION COMPLAINED OF WAS TAKEN UNDER COLOR OF STATE LAW.

Respondent's complaint clearly states that the acts of Petitioners were done under color of the authority conferred upon the California Senate Committee on Un-American Activities — The Tenney Committee. (R. 10). There can be no question that at all times material hereto Petitioners have acted under the color of the authority vested in The Tenney Committee by the resolution creating it under the California Constitution (R. 12-18).

Petitioners urge that they are immune from civil suit and that Section 43 must be read as if members of the state legislature were exempted from the prohibition and the sanctions of said section. This contention is clearly in opposition to the express language of the statute which imposes liability upon "Every person who under color of any statute, etc., of any state" engages in conduct prescribed by Congress. It is apparent that Congress did not intend any exception in favor of *any* person acting under color of state law whatever his position or eminence. Such all-embracing language clearly prevents any construction of the statute in disregard of its purpose.[18]

The purpose of Section 43 was to create an ironclad protection of federal rights against abuse of state

[18] In *Screws v. United States*, 325 U.S. 91, 97; legislators are expressly referred to along with other state officials as being sub- [illegible] provisions of the Civil Rights Statutes

power and this purpose could never be attained if Congress had allowed *anyone* clothed with state power to invade federal rights with immunity.

A state is free to vest whatever power it deems proper in the legislative branch of its government.[2] Hence, to say that the members of a state legislature can violate with immunity the federal rights protected by Section 43 means to deny the effective protection of those rights, for the states would be free to invade federal rights by effectively clothing its legislative agents with power to annul or evade the sanctions provided for in Section 43. As stated by the United States Supreme Court in *Ex parte Virginia*, 100 U.S. 339, 346, 347:

> "* * * A State acts by its Legislative, its Executive or its Judicial authority. It can act in no other way. * * * Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

See: *Screws v. United States*, 325 U.S. 91, 114 and 133.

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[2] See: *Hughes v. Superior Court of California*, 339 U.S. 460, 467: "For the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches (citing cases) 'rights under that amendment turn on the power of the state, no matter by what organ it acts', *Missouri v. Dockery*, 191 U.S. 165, 170, 171."

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes Constitutional rights. If that be a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, Sections 19 and 20 [241, 242, 18 U.S.C.] have done in a manner history has long since validated."

(Rutledge, J., concurring in result, *Screws v. United States*, page 133).

In *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240, it was held: Congress by enacting Section 43, Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (page 250); and further: Where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of plaintiffs to New York arose under Section 47, Title 8 U.S.C., Pennsylvania statutes Sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Statutes (page 251).

As recognized in the *Picking* case and in the concurring opinion of Justice Rutledge in the *Screws* case there can be no privilege created by state law to be immune from federal law for the violation of federal rights, and any such common law privilege has been abrogated by Congress to the extent indicated by the Civil Rights Statutes.

Whoever deems that such protection of federal rights by Congress is too harsh or burdensome upon state officials must necessarily address his argument to Congress. The imposition of civil liability under the Civil Rights Statutes for the deprivation of fundamental rights by abuse of state authority is not an innovation in the law but is a concept well known to the Common Law in its protection of ordered liberty.

As stated in *Wolf v. Colorado*, 338 U.S. 25, 30-31, footnote 1 thereof, in connection with the problem of the use of evidence secured through an illegal search and seizure:

> "The common law provides actions for damages against the searching officer [citing cases]; against one who procures the issuance of a warrant maliciously and without probable cause [citing cases]; against a magistrate who has acted without jurisdiction in issuing a warrant [citing cases] and against persons assisting in the execution of an illegal search [citing cases]. * * *"

Petitioners contend that there is no distinction between a state legislator and a federal congressman and that there should be no distinction between a claim of civil liability against members of a state Un-Amer-

ican Activities Committee and the members of the Un-American Activities Committee of the House of Representatives (Brief for Petitioners, page 36).

In connection with Section 43 there is however a vital distinction between state and federal legislators: Section 43 predicates liability only upon action taken under color of *state* law. Since federal legislators do not act under color of *state* law, their conduct is not subject to the sanctions provided for under said federal statute. It would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barksy v. United States,* 167 Fed. (2d) 241; *Dennis v. United States,* 171 Fed. (2d) 986 and *Eisler v. United States,* 170 Fed. (2d) 273. It may be said in passing, however, that even as to the power of Congressional Committees it was stated in *McGrain v. Daugherty,* 273 U.S. 135, 175-176:

> "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*[3] and *Marshall v. Gordon*[4] point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *Re Chapman*[5] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the ques-

[3] 103 U.S. 168.
[4] 243 U.S. 521.
[5] 166 U.S. 661.

tions are not pertinent to the matter under inquiry."

See also:

Dissenting Opinion, per Edgerton, J. in *Barksy v. United States,* 167 F. (2d) 241, 252;

Dissenting Opinion, per Prettyman, J. in *Eisler v. United States,* 170 F. (2d) 273, 281;

47 *Col. Law Rev.* 416, 428.

Petitioners also seek to escape liability by intimating that the action taken by them was not under color of state law on the ground that the committee had no power to act during a recess taken by the legislature under the California Constitution, Article 4, Section 2 (Brief for Petitioners, pages 11-12). Apart from the fact that it does not appear from the record in this cause that the California Legislature was in fact in recess during the time in question, it is established by *Screws v. United States,* 325 U.S. 91 that one who acts under color of state law is liable under Section 43 even though the action involved was contrary to the state law.

See also:

United States v. Classic, 313 U.S. 299, 326;

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287;

Siegal v. Ragan, 88 F. Supp. 996 affm'd. 180 F. (2d) 785.

Moreover, the California Senate Resolution creating the Tenney Committee (R. 12-18), pursuant to Article 4, Section 37 of the California Constitution, author-

ized said Committee to act during any such recess of the state legislature (R. 14-15).

B. PETITIONERS' CONDUCT WAS IN VIOLATION OF FEDERAL RIGHTS OF RESPONDENT.

The present action is based upon intentional abuse of state authority to deny a political opponent: (1) the right to petition the government for redress of his grievances, (2) the right of free speech, (3) the right to a fair and impartial hearing in matters concerning his person, privacy, opportunity to earn a living and his honor, and (4) the equal protection of the laws.

All these rights are fundamental federal rights and as such are protected by the Federal Constitution and the laws of the United States. They are therefore within the provisions of Section 43 of Title 8 U.S.C.

1. The right to petition the government for redress of grievances.

It is contended by Petitioners that the Federal Constitution does not protect the right of a citizen to submit a petition to the legislature of his own state (Brief for Petitioners, p. 27). This contention is based upon the wording of the First Amendment to the Federal Constitution and underlines the well known fact that the First Amendment, as conceived and worded, was directed against the exercise of federal power in abridgement of the fundamental rights protected by that amendment. Unquestionably the First Amendment was conceived and adopted to prevent the federal authority from interfering with the rights and freedoms specified therein. Nevertheless, the word

"government" referring to the addressee of a citizen's petition did not mean solely the federal government but also the state government. The federal power by reason of the First Amendment is prevented from interfering with petitions where they are addressed to the state government as well as the federal government. This being so, it follows that since the Fourteenth Amendment transmits the prohibitions of the First Amendment into the relationship between state government and those subject to state power, the prohibition against federal power contained in the First Amendment has become a prohibition directed against state power, and, therefore, the state government with all its branches are prevented from interfering with petitions of state citizens to their legislature.

Assuming, arguendo, however, that any flaw were to be found in this logic, Petitioners' contention nevertheless must fail. There is no need for niceties of construction where such an important issue is involved as the one here in question. This Court has always followed the exhortation expressed in the simple words of Chief Justice Marshall: "It is a Constitution that we are expounding."

If a principle of such vast importance and generality as that expressed in the First Amendment is transmitted into the Fourteenth Amendment, then the principle, in its new surroundings, must be understood as the climate and the exigencies of these new surroundings require it to be read. In the words of Mr. Justice Jackson writing for this Court, the Fourteenth Amendment is "an instrument for transmit-

ting the principles of the First Amendment" (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639). According to this statement *"principles"* rather than words are transmitted. One of these transmitted principles is the right of free men to address their government freely by petitioning for redress of their grievances. Hence, even if it be assumed that the word "government" in the First Amendment means "federal government" only, transmittal of the principle of the right to petition into the Fourteenth Amendment would mean that the state government can be addressed by a petitioner in the same climate of freedom in which a petitioner can address the federal government under the First Amendment.

This protected sphere of freedom to petition involves freedom of the petitioner from intimidation and molestation in connection with his petition.

The right to petition the government freely is a right so inherent in free society that it hardly needs any expression in the constitution of a democracy recognizing the sovereignty of the people.

Story, in his Commentaries on the United States Constitution, expresses this thought as follows:

> "The remaining clause secures 'the right of the people peaceably to assemble and to petition the government for a redress of grievances'.
>
> This would seem unnecessary to be expressly provided for in a republican form of government, since it results from the very nature of its structure and institutions. It is impossible that it could

be practically denied until the spirit of liberty had wholly disappeared and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."

2 *Story, Commentaries on the Constitution of The U.S.*, 5th Ed., p. 645.

See also:

1 *Cooley, Constitutional Limitations*, 8th Ed., pp. 728, 729.

The origin of the provision in the United States Constitution guaranteeing the right to petition can be traced to the Declaration of Rights in England of 1689[6] which, after the case of the Seven Bishops (*12 Howell's State Trials 183*), confirmed the ancient right to petition for redress of grievances by declaring:

"That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."[6]

This *express* recognition of the ancient right to petition, so long considered self-evident, was the result of periods of suppression of the right by Charles II.

See 1 *May, Constitutional History of England*, pp. 349-350.

Similar suppression of the right to petition under George III by the King and a majority of Parliament gave rise to the solemn emphasis given to that

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[6]Bill of Rights, 1689; Statutes of the Realm VI, 142; 1 Wm. & Mary, st. 2, c. 2. See: Stevenson & Marcham, Sources of English Constitutional History (1937), 599, 601.

right in the documents preceding our own Declaration of Independence[7] as well as in that Declaration itself.

The historical development through which the right to petition for redress of grievances won express recognition as a fundamental right illuminates the content of the right. The necessity of written recognition

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[7] See:

Declaration of Rights.

In Congress, at New York, October 19, 1765.

"• • • Lastly, that it is the indispensable duty of these colonies, to the best of sovereigns, to the mother country, and to themselves, to endeavor by a loyal and dutiful address to His Majesty, and humble applications to both houses of Parliament, to procure the repeal of the act for granting and applying certain stamp duties, of all clauses of any other acts of Parliament, whereby the jurisdiction of the admiralty is extended, as aforesaid, and of the other late acts for the restriction of American commerce."

Declaration of Rights.

In Congress, at Philadelphia, October 14, 1774.

"• • • And Whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal and reasonable petitions to the Crown for redress, have been repeatedly treated with contempt by His Majesty's ministers of state:

• • • *Resolved*, 7. That these, His Majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

• • • *Resolved*, 8. That they have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."

See: United States Constitution, Sesquicentennial Commission, History of the Formation of the Union under the Constitution, with liberty documents and report of the Commission, 1941.

The Declaration of Independence (Adopted in Congress July 2; Signed July 4, 1776).

"• • • In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people. • • •"

resulted from tyranny which attempted to punish and oppress those who dared to exercise the right in matters of public concern. Indeed, May, one of the outstanding authorities on British Constitutional history, speaks of "the modern system of petitioning by which public measures, and matters of general policy, have been pressed upon the attention of Parliament since the suppression of the right to petition by George III".

See: 1 *May, Constitutional History of England,* p. 350.

The practical and legal gist of petitioning the government as of right and not as of grace is: that a petitioner shall be safe in his person when addressing himself to the proper authorities. History illustrates that tyrants deal with petitions arbitrarily, rewarding petitioners if they like what they say, and considering petitioning rebellious and seditious if not in accord with what they wish to hear.

Since it is of the essence in a democratic society to encourage the interest of citizens in public affairs and to permit their criticisms to be heard and considered by those wielding governmental power, it follows that a citizen must be protected from all forms of oppression when he participates by petitioning his legislature in matters of public concern. The right to petition therefore necessarily involves not only access to the constituted authorities, but also the guarantee of personal safety and freedom from reprisal for the exercise of the right.

Amongst the numerous decisions recognizing this principle, the early New York case of *Thorn v. Blanchard* (N.Y.) 5 Johns. 508, is illustrative. The case held that libel does not lie where a petition to an appointing authority criticized a public official and accused him of serious wrongdoing; quoting from one of the majority opinions (Clinton, Senator) at pp. 530-532 thereof:

> "The policy of the law here steps in and controls the individual right of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of an analogous nature. (*2 Hawk. b.1.c. 73 s.8. 4 Bac. Abr. 452. Esp. Dig. 506.* and *4 Com. Dig. 717 c.2.*) The case before us is an application to the council of appointment for the removal of a district attorney, charging him with malversation in office. It is in the nature of a memorial for the redress of grievances, addressed in the proper channel by which such redress might be had. * * * the present complaint was addressed to the proper *forum;* and that unless we deny its power to expel a public officer, holding during pleasure, from office, we must admit, that the grievances complained of by the plaintiff and his coadjutators, were transmitted to the competent and proper authority; and, whether true or false, whether innocent or malicious, the powerful and commanding dictates of public policy must merge and extinguish all individual claims, and all personal considerations."

See:

2 *Story, Commentaries on the Constitution of the U.S.*, 5th Ed., p. 645 (b):

"The statements made in petitions to the proper authority, in a matter within its jurisdiction are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously: Thorn v. Blanchard, 5 Johns. 508; Gray v. Pentland, 2 S & R 23; Howard v. Thompson, 21 Wend. 319; Bodwell v. Osgood, 3 Pick. 379; Harris v. Huntington, 2 Tyler 129; O'Donaghue v. McGovern, 23 Wend. 26; Chapman v. Delorme, 2 Brev. 76; Bradley v. Heath, 12 Pick. 163."

See also:

McKee v. Hughes, 133 Tenn. 455; 181 S.W. 930;

Harrison v. Bush, 5 El. & Bl. 344; 119 Eng. Rep. (Full Reprint) 509;

Connellee v. Blanton (Tex. Civ. App.), 163 S.W. 404;

Keenan v. McMurray, 34 Pittsb. L.J.N.S. (Pa.) 223;

Andrews v. Gardiner, 224 N.Y. 440; 121 N.E. 341;

Cook v. Hill, 1849 (N.Y.) 3 Sandf. 341;

2 *A.L.R.* 1376;

Prosser on Torts, Hornbook Series (1941), pp. 839-840 and note 70 p. 840 with law review articles there cited.

Whatever the scope of the preferred status enjoyed by a petitioner with relation to the content of his pe-

tition, wherever the persons affected by the petition have resorted to the Courts for relief, one thing is clear: Officials whose conduct is discussed and criticized in a petition cannot take the matter into their own hands and silence or punish the petitioner without such reprisal flying in the face of the Constitutional prohibition.

It is not without interest in turning to the Constitution of Switzerland, a country with traditions similar to ours regarding fundamental freedoms, to find that the Swiss Constitution provides in Article 57 thereof that "The right of petition is guaranteed". In construing this provision Professor Fleiner writes in his text book on Swiss Constitutional Law (Schweizerisches Bundesstaatsrecht, 1923) at page 322:

> "The right of petition guaranteed in Article 57 of the Federal Constitution grants to each resident of the country the right to address himself with requests and suggestions to the different branches of the government of the Union and of the Kantons without fear of being subjected to molestations or legal detriments of any kind for such conduct. In a commonwealth based upon sovereignty of the people the right to petition is as a matter of course, within the legal powers of a citizen. The Federal Constitution has specified this right only for historical reasons. The police-state of the eighteenth century was inclined to find in a petition of a subject an illicit intrusion into the powers of a government or even a rebellion. To such an apprehension, the [written] guarantee of the right to petition has definitely made an end." (Translation from the German.)

This discussion of the learned author aptly explains why constitutions of three countries which recognize the principle of the sovereignty of the people have found it necessary to mention the right not to be molested or harassed for submitting one's views to the government.

Professor Bruckhardt, in his annotated edition of the Swiss Constitution, Second Edition at page 545, comments as follows:

> "The right of the individual consists in this, that without legal detriment from the government he may submit such critical or practical utterances to the authorities. It is fitting that such a right of the individual can be guaranteed inasmuch as impediments thereto by the government are conceivable. If the petitioning had not been prohibited and punished formerly, the guarantee of Section 57 would probably not have entered into the Federal Constitution; but since the guarantee is in the Constitution, its meaning can be no other. Incidentally, the right to petition even today, where nobody any more thinks of prohibiting memorials of supplication, carries with it the good sense of securing to everybody the possibility to reach the authority which he invokes and to be interrogated by it. It would be therefore unconstitutional, if any public authority would close its door to petitions; for instance: if an authority consisting of several members, without taking cognizance of such petitions, would give the mandate to individual members to dispose of them themselves; on the other hand, a public authority is, of course, under no obligation, as a whole, to

take cognizance of the full contents of the petition." (Translated from the German.)

This comment seems to be most pertinent in the present case, inasmuch as it makes it clear that the right to petition involves the right of the petitioner to gain free access to the addressee of the petition, not so much in a physical way as by having his full opportunity to gain the audience of the body to which the petition is directed.

In the instant case Petitioners contend that they did not interfere with Respondent's right to petition for the redress of grievances, since they did not snatch from Brandhove's hands the petition which he was circulating among the members of the California Legislature (Brief for Petitioners, page 24). Even in a strictly mechanical sense, interference with the process of petitioning did take place here inasmuch as it appears from the record (R. 5; Complaint par. 4) that Respondent was served with subpoena for the hearing before the Tenney Committee, while he was still physically engaged in so distributing his petition. Such summons was a warning signal to the Respondent and put him on notice that he would not remain unmolested, having dared to criticize those powerful enough to molest and harass him for his criticism.

It is equally clear and obvious that the right to petition the legislature is not confined to and exhausted by distribution of copies of the written instrument. One who petitions a legislative body must stand ready to give explanations whenever requested by that body

and to follow up the effect of the written statement on the minds of the addressees of the petition by discussing with them the contents thereof. A petition to the legislature is made to impress the minds of the addressees and to lead to an interrogation of the petitioner by the legislative body or some committee thereof entrusted with the power and the function to examine the contents of such a petition and to determine whether action by the legislative body is called for.

See:

Ex parte McCarthy, 29 Cal. 395, 406.

The members of the Tenney Committee, as disclosed by the record in the instant cause, in fear of investigation and exposure of their own misconduct by the California Legislature, with the utmost speed, intercepted the attempted exchange of ideas between Brandhove and his legislature by interposing themselves as judges in a matter in which they were the accused.

In this regard the Court of Appeals has correctly recognized and considered the significance of the sequence of the swift moving events as disclosed by the record: The telephone conversation between Tenney and Robinson after Brandhove commenced to circulate his petition among the legislators, and immediately upon Tenney becoming aware of the content of the same (R. 4-5; 45-47); the hastily conceived plan to thwart the purpose thereof (R. 5, 47); the service of the subpoena on Brandhove, while he was

still distributing his petition, to appear before the accused committee on the following day (R. 5, 22); immediately thereafter, the dispatch of State telegrams to the respective District Attorneys demanding Brandhove's prosecution for perjury (R. 6, 23-24); the setting of the stage at the hearing with the full committee and representatives of the State Attorney General's Office and the California Legislative Counsel present with books and authorities ready (R. 26, 33); the presence of Robinson at the hearing as planned and his partial attitude thereat resulting in his being congratulated for his Americanism (R. 6-7; 45-47; 50-67); the vilification of Brandhove to discredit his petition and the intimidation of him at the hearing (R. 7; 42-45; 48-50; 67-69; 73-74); the leading, bolstering and acclamation of Robinson by the Committee in connection with the preconceived plan (R. 7; 45-47; 50-67); the unfair and partial conduct of the hearing with regard to Brandhove and his counsel (R. 6-7; 26-75); the questions asked of Brandhove at the hearing, the answers to which the Committee had long previously obtained from him (R. 7); the holding of Brandhove in contempt for failure to answer those questions (R. 42); and, the arrest and imprisonment of Brandhove on the contempt charge brought by the Committee (R. 8-9).

The constitutional guaranty of the right to petition for redress of grievances applies to petitions directed to proper authorities, or to the authorities which the petitioner in good faith deems to be proper ones

under the circumstances. See *Larkin v. Noonan,* 19 Wis. 93; *Marks v. Baker,* 28 Minn. 162, 9 N.W. 678, 679; *Connellee v. Blanton* (Tex. Civ. App.), 163 S.W. 404; *Thorn v. Blanchard* (N.Y.), 5 Johns. 508.

In this case there can be no question that Brandhove addressed himself in his petition to the only proper authority, since there was no authority except the legislature which had power to discontinue further appropriation of funds for the Tenney Committee.

Petitioners rely on *Ex parte McCarthy,* 29 Cal. 395, in justification of their conduct toward Brandhove. The *McCarthy* case simply holds that the California Legislature has a right to investigate charges against its members, such as the charge of bribery involved in that cause. Naturally the case does not hold that the accused members were the proper authority to investigate the charge against themselves. The parliamentary law upon which the California Court relied in that case was that a legislature has the power:

> "* * * among other things, to judge of the qualifications of its own members, to preserve its own honor, dignity, purity, and efficiency, by the expulsion of an unworthy or the discharge of an incompetent member; to protect itself and its members from corruption; and as necessary to the intelligent exercise of those powers they may summon and examine witnesses and compel them to testify by process of contempt, when without good cause they refuse to do so." (page 406).

Brandhove's conduct was precisely in accord with the general rule stated in the *McCarthy* case: by his

petition he called the attention of the entire legislature to the alleged misconduct of certain of its members (those constituting the Tenney Committee thereof). By preventing an impartial investigation by the legislature or an opportunity for the legislature as a whole to consider Brandhove's petition, the Tenney Committee did all in its power to defeat the proper exercise of the rights of the California Legislature under general rules of parliamentary law as recognized by the California Supreme Court in the *McCarthy* case.[8]

2. The right of free speech.

It is clear that there can be no rigid distinction drawn between the right to petition for redress of grievances and the right to speak freely. The right to petition is merely the exercise of freedom of speech under certain circumstances which entitle the speaker to even greater consideration and protection in the dissemination of his ideas since he directs his utterances to the proper authorities. By petitioning the proper authorities, the speaker channels his criticisms and ideas to the government which is supposed to receive, weigh and consider such expressions, and if found to be constructive, to use them in the public interest. The very concept of sovereignty of the people requires this kind of continuous participation of the people in their government, and the preservation

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[8] With regard to the vital difference between the legislative body acting as a whole and an unauthorized committee thereof, see: semble accord:

United States v. Bryan, 339 U.S. 323, 325-326;
United States v. Fleischman, 339 U.S. 349, 365.

of a republican form of government necessitates the encouragement and protection of the exercise of this right (Art. IV, Sec. 4, U.S. Constitution).

As stated by this Court in *Thomas v. Collins*, 323 U.S. 516, 530-531:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the right of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, c.f. *De Jonge v. Oregon*, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. C.f. 1 Annals of Congress, 759-760 * * * Great secular causes, with small ones, are guarded. The grievances for redress of which the right to petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

Petitioners contend that respondent's right of free speech was not infringed by them, since he had already finished speaking, before the Tenney Committee hearing took place (Brief for Petitioners, page 23).

This contention overlooks the facts that the subpoena for Brandhove to appear before the Tenney Committee was served while he was in the physical process of distributing his petition and that at substantially the same time State telegrams were dispatched to two different District Attorneys admon-

ishing them in the name of the California State Senate Committee to prosecute the Respondent in connection with his petition. But even more important, such contention ignores the scope of the right of free speech which depends upon the context in which it is exercised. There is a patent difference between making a speech in a public park and addressing the legislature in a petition dealing with a complex problem of public interest.

See:

Concurring opinion of Mr. Justice Frankfurter in *Feiner v. New York,* 95 L. Ed. Adv. Op. 253, 263.

Whereas the street speaker is at the end of his speech when he has uttered his last sentence, a petitioner who has delivered a petition to each member of his legislature is only after circulation thereof, at the very threshold of the exercise of this right. For after the delivery of the written word into the hands of the addressees, it becomes necessary for him to persuade each member of the legislature who is interested in the matter, by the normal processes of persuasion, that the evils asserted therein should be gone into and remedied.

Petitioners also ignore the fact that the right of free speech is guaranteed by the Constitution not merely for the benefit of the individual who exercises that right, but in order to insure the continuing existence of a democratic community. Suppression or punishment subsequent to the exercise of the right is therefore unconstitutional.

As recently stated by this Court in *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5:

> "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger * * * That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

It appears to be Petitioners' position that since they did not *expressly* prohibit further dissemination by Respondent of his petition and his ideas therein expressed, no infringement of the right of free speech was perfected.

The constitutional right of free speech is protected against more subtle attacks than such express prohibition. Where, as here, State authority is used as a pervasive threat, creating a situation and atmosphere of fear and danger for him who speaks, a violation of this fundamental right is effected.

See:

Schneider v. Irvington, 308 U.S. 147, 161-162;
Thornhill v. Alabama, 310 U.S. 88, 101-102;
Pennekamp v. Florida, 328 U.S. 331.

This guiding principle has been recently expressed in *American Communications Association v. Douds*, 339 U.S. 382, 402:

> "The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief. But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragement' undoubtedly has the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

In the *Douds* case, this Court emphasizes the doctrine that if there are paramount interests outside of the struggle of ideas which make it necessary to limit or restrict the right to free speech, the urgency of such interests will be weighed against the interest of society in the free exercise of the right of free speech. —"Even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake." (Page 397.)

In the instant case, Petitioners contend that there is here involved a paramount interest of the people to elect and have legislators act for them who are answerable only to the people (Brief for Petitioners, Pages 38-39). But legislators, though they may criticize others with immunity, are, in the struggle of

ideas, not immune from the criticism of the public and any member thereof. No question is raised as to the right of the Tenney Committee and its members to use their influence and faculties of persuasion to secure the continued existence of their committee. For such end, however, they must fight in the political arena on the level of equality with others; they cannot use their public power to silence the voice that displeases them. "Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment." (*American Communications Association v. Douds*, 339 U.S. 383, 396.)

At the core of Petitioners' argument is the thought that even in abusing their powers, they should not be held liable in damages to a person whose fundamental rights they have violated. This contention is beyond the scope of the present litigation; it is clearly an invitation for judicial legislation to abolish the Civil Rights Statutes as applied to State Legislators.

3. Violation of due process of law.

The issue of violation of due process of law by the conduct of Petitioners has been properly raised in Braidhove's complaint (R 3-11; 11-75).

This attack against the conduct of Petitioners in wielding State power cannot be considered separate and apart from Respondent's allegations relating to his First Amendment rights. The method and man-

ner used by Petitioners to meet the criticism uttered in Respondent's exercise of constitutional rights are indicative of their obnoxious intent, and quite apart from the due process question, are a necessary part in the determination relating to the violation of First Amendment rights. For example: Where a speech is made on a city street at a place where traffic is obstructed thereby, it is proper for the police to request the speaker to continue at another place in the vicinity, while free speech would be there infringed by the use of a police club to silence the speaker.

Insofar as due process itself is here concerned, we start with the proposition that "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice * * * It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused 'the Assistance of Counsel for his defense.'" (*Foster v. Illinois*, 332 U.S. 134, 136.)

Respondent's challenge in reliance upon the due process clause of the Fourteenth Amendment does not relate to the several actions of petitioners considered in isolation, but involves petitioners' entire pleaded conduct considered as a whole. When so considered and evaluated, petitioners' method and manner in dealing with their opponent cannot be distinguished from the contemptible and vindictive means of a police state.

This approach to the due process problem has been expressed by Mr. Justice Frankfurter as follows:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the due process clause imply that judges are wholly at large." (Mr. Justice Frankfurter, concurring in *Adamson v. California*, 332 U.S. 59, 67-68.)

See also: *American Communications Association v. Douds*, 339 U.S. 382, 394, quoting the remarks of Mr. Justice Holmes that the provisions of the Constitution

> "are not mathematical formulas having their interest in their form", but, "organic living institutions transplanted from English soil." (*Gompers v. United States*, 233 U.S. 604, 610.)

In the instant case, the Tenney Committee, entered into the hearing in question as a partisan and acted as such even prior to the commencement thereof. No other explanation can be given for the State telegrams dispatched by the chairman and vice-chairman of the committee to the respective District Attorneys demanding prosecution of Brandhove in connection with his circulated petition (R. 23-25). This act of vindictiveness is clear corroboration of Respondent's allegation that the committee did not wish to conduct

a fair investigation but intended to and did punish and oppress him during said hearing and afterwards.

See:

Screws v. U. S., 325 U.S. 91, 106:

> "Those who decide to take the law into their own hands and act as prosecutor, jury, judge and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act."

See also:

Tot v. U. S., 319 U.S. 463.

As the allegations of Respondent's complaint must be taken as true, it further appears that the chairman of the committee had already conspired with the star witness, Robinson, prior to the setting of the hearing to thwart the effect of Brandhove's petition, to blacken his character and to vindicate the committee and its star witness from the charges contained in said petition (R. 5-6; 45-47).

In congruity with the object of the hearing is the treatment received by Respondent's counsel at the hands of the committee—the calling of him as a witness and his lengthy interrogation concerning his schooling and his private affairs. The questions then and there put to counsel clearly show that the committee did not know him and had not the slightest reason to call him as a witness except for counsel's undertaking to represent their political opponent (R. 7-8;

48-50). The Federal Constitution stands as a bar against such contemptuous treatment of an attorney engaged in the practice of his profession, to say nothing of the intended and effective intimidation of Respondent by such treatment of his counsel. It is also pointed out in this connection that when Respondent's counsel referred to decisions of the United States Supreme Court supporting the objections raised by Respondent against said hearing and supporting Respondent's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room (R. 8; 34-35).

With regard to Respondent, the unfairness of the committee's conduct and their vilification of him at the hearing, culminated in the reading into the record thereof, a false alleged criminal record attributed to him, which "record" was read *after* the Tenney Committee had cited him for contempt (R. 42-44). These were the words of Petitioner Tenney in his capacity as chairman of the Committee:

> "Mr. Brandhove has a criminal record; he was charged with sodomy in Jersey City on October 27th, 1930; on October 3rd, 1935, grand theft; and went to Preston School of Industry; May 5th, 1940, in Oakland, sentenced to $25.00 or five days for violation of the California Motor Vehicle Code; April 7th, 1942, wanted for grand theft and burglary in San Jose, California; March 17th, 1946, San Francisco, malicious mischief at 1255 Kearny Street, San Francisco; November 26th, 1946, San Francisco, violation of the Penal Code for defrauding an innkeeper; a felony warrant for his arrest charging grand theft, Section 503

of the Vehicle Code, was cancelled in Los Angeles because the victim could not be located on March 3, 1947" (R. 43-44).

As alleged by Respondent in his complaint (R. 10), this reading of a false criminal record was maliciously done by Petitioners for the unlawful purpose of intimidation and harming him in his most sacred rights.

Even carelessness leading to the reading of a false criminal record has been excoriated by this Court as irreconcilable with minimal standards of fair play:

> "But it savors of foul play or carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty * * * It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the carelessness or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." (*Townsend v. Burke*, 334 U.S. 736, 740, 741).

In the instant case, counsel, although present was powerless, after his client had already been cited for contempt and after counsel had been threatened with expulsion from the hearing room, to protect Brandhove from such designed attack on his honor (R. 26-75).

See also:

Michelson v. United States, 335 U.S. 469, 480;
Wolf v. Colorado, 338 U.S. 25, 30, 31.

Finally, in addition to the false criminal record, it appears from Respondent's pleadings herein that after he was cited for contempt at the hearing in question, the chairman of the Tenney Committee read into the record thereof, a passage of a newspaper article wherein an affidavit of Respondent was termed "a tissue of lies" (R. 44-45) and referred to an alleged telephonic statement from the counsel for the committee that Respondent "was a liar" (R. 73-74).

If such is a fair and impartial hearing as contemplated under the Fourteenth Amendment of the United States Constitution, the Respondent admits that he has failed to state a claim for relief on such ground.

4. Denial of equal protection of the laws.

Deprivation of an individual of his fundamental rights by state officials on the ground that his views are opposed to theirs or that he has aired their corruption or misconduct, is one of the most obnoxious patterns of denial of equal protection of the laws as guaranteed by the Federal Constitution. State power, when its exercise is not limited by standards that appeal to reason, becomes absolute, and such power where exercised maliciously, becomes suppression in the private interest of those wielding the state's power. If the general guaranty of equality would fail to check devices and stratagems in circumvention of First Amendment rights by malicious use of power claimed to be practically absolute, our system of government would be at the whim of those who despise its most cherished values or fail to understand them.

Under circumstances lacking many of the somber implications of the instant case, this Court has recently relied on the Equal Protection Clause in striking down the exercise of public power, unlimited by reasonable and definite standards, to prohibit the use of a public park for a religious meeting. Mr. Chief Justice Vinson, writing for the Court in *Niemotko v. Maryland*, 95 L.ed. Adv. Op. 237, 239, stated:

> "* * * we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice', whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here. * * * Indeed, rarely has any case been before this Court which shows so clearly an unwarranted discrimination in a refusal to issue such a license. * * * In fact, the Mayor testified that the permit would probably have been granted if, at the hearing, the applicants had not started to 'berate' the Park Commissioner for his refusal to issue the permit. The only questions asked of the witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the witnesses or their views. *The right to equal protection of the laws, in the exercise of*

those freedoms of speech and of religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local government body." (Emphasis added.)

Indeed, when the scene is transmitted from the local sphere in the *Niemotko* case to the larger sphere of state politics in the instant case, and when bigotry, local camaraderie and vanity there at work are replaced by corruption and lust for power of a clique seeking to perpetuate the vast powers of an Un-American Activities Committee, which is the gist of the allegations in this case, a striking parallelism between the two cases appears. In both cases a small body of men (there is no proper basis for Petitioners' attempt to identify their Committee with the State Legislature with its great number of members holding widely divergent views) exercising practically absolute power infringed upon freedom of speech and cognate freedoms by reason of antagonism and selfish interests. The difference lies in the facts that in the *Niemotko* case the deciding body was not judge and accused in the same case; that it did not interfere with orderly democratic processes, such as petitioning to a State Legislature; that no demands were made on state prosecutors to indict the unwelcome speaker; that the attorney appearing at the hearing was left unmolested; and that no criminal record was invented to blacken and discredit the injured person. Such methods applied by the Committee assisted by two state attorneys at the hearing in question obviously

multiply the reasons for the Court's holding in the *Niemotko* case that whim and personal antipathy cannot control the exercise of state power in matters concerning free speech, freedom of petition and cognate fundamental rights without violating equality of protection by the laws.

In the *Niemotko* case, the holding that there was a denial of equal protection was based on the determination that the refusal to grant the permit was "completely arbitrary and discriminatory" (p. 240, 95 L. Ed. Adv. Op.). In that case this Court found it unnecessary to determine that other permit applicants were treated differently from the complainants. Indeed no reasonable distinction can be drawn between an arbitrary and discriminatory practice against all applicants as opposed to one, under which some are treated better than others. Equality of the law is denied where whim determines official action.

In the instant case, Robinson's treatment as a witness was clearly and purposefully different from the treatment accorded to respondent and his counsel at the same hearing. Furthermore, there is a presumption under California law applicable by the Federal Court sitting in California, that official duty has been regularly performed (California Code of Civil Procedure, Section 1963(15)) which necessitates the conclusion that the Tenney Committee has discriminated against Respondent.

Evil purpose, object and malice in deprivation of equal protection of the laws are properly pleaded by

general averment in Respondent's complaint (Complaint paragraphs 13, 14; R. 10).

See:

F.R.C.P. Rule 9(b);
F.R.C.P. Rule 8(f);
F.R.C.P. Rule 8(a)2.

As stated in *Snowden v. Hughes,* 321 U.S. 1, 11:

> "Where [purposeful] discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."

See:

Nixon v. Herndon, 273 U.S. 536, 540;
Nixon v. Condon, 286 U.S. 73, 88-89.

See also Mr. Justice Frankfurter concurring in *Snowden v. Hughes,* 321 U.S. 1, 13-15:

> "The Fourteenth Amendment does not permit a State to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment."

Apart from the express averments of malice and purposeful discrimination by Respondent, the facts pleaded by him inescapably lead to the conclusion that there was purposeful discrimination which element was lacking in *Snowden v. Hughes,* 321 U.S. 1, 8, and if there present, would have been sufficient for a reverse holding there.

(The dissenting Justices even in the *Snowden* case found sufficient allegations as a predicate for proof of purposeful discrimination.)[9, 9a]

The essence of the matter here is that Respondent was singled out for arbitrary treatment purposefully discriminating against him by design and plan of petitioners to use their power to suppress his views and criticism and to punish him for his utterances.

Such state action has been held to violate the equal protection guaranty and to be sufficient basis for civil liability under the Civil Rights Statutes.

See:

Burt v. City of N. Y., 156 F. (2d) 791, 792 (opinion by Learned Hand, J.):

"But the decision [*Snowden v. Hughes*, 321 U.S. 1] definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also

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[9]Purposeful discrimination may appear on the face of the action taken with respect to a particular class or person, *Snowden v. Hughes*, 321 U.S. 1, 8; *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-87, or it may be shown by extrinsic evidence relating to a discriminatory design to favor one individual or class over another not to be inferred from the action itself.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374;
Neal v. Delaware, 103 U.S. 370, 394, 397;
Norris v. Alabama, 294 U.S. 587, 589;
Pierre v. Louisiana, 306 U.S. 354;
Smith v. Texas, 311 U.S. 128, 130-131;
Hill v. Texas, 316 U.S. 400, 404;
Cochran v. Kansas, 316 U.S. 255, 257-258.

[9a]It should be noted that the new rules of pleading as amended in 1946 and 1948 with the purpose of liberalizing pleading requirements were not in effect at the time of the decision in the *Snowden* case. It would seem that the dissenting opinion there conforms to the present liberalization of pleading. See: Notes of Advisory Committee on Rules, F.R.C.P., 28 U.S.C.A., pp. 252, 317.

with purposely singling him out alone for tha
misinterpretation, it is good against demurrer.

See also:

McShane v. Moldovan, 172 F. (2d) 1016;
Picking v. Penn. Ry. Co., 151 F. (2d) 240.

5. **Abridgement of privileges and immunities of respondent.**

Whatever the meaning of the words "privileges o
immunities" in the Fourteenth Amendment to th
United States Constitution, it is clear that the word
as used in Section 43, Title 8, U.S.C. supplement th
word "rights" immediately preceding them, therein
The privileges or immunities in Section 43 and th
similar expression in Section 47(3) make it clear tha
any favorable position secured to a citizen (regard
less of distinction between Federal and State citizen
ship) by the Constitution and the laws of the Unite
States are within the purview of these sections.

Thus, he who exercises his right to petition the Gov
ernment for redress of grievances shall be immun
from molestation and chicanery by action under colo
of State law; whether that be termed a right, a privi
lege or an immunity shall make no difference unde
the all-embracing language of Section 43 and the sim
ilar language in Section 47(3).

See:

Hague v. C.I.O., 307 U.S. 496.

III.

RESPONDENT'S COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE PROVISIONS OF SECTION 47(3) OF TITLE 8 U.S.C.

What has been discussed above pertaining to denial by Petitioners of Respondent's right to the equal protection of the laws demonstrates that respondent's complaint is within the purview of Section 47(3), Title 8, U.S.C. The cases cited with reference to equal protection of the laws are hereby referred to as authority for the applicability of Section 47(3) to this case.

Section 47(3) not only prohibits action in denial of equal protection of the laws but also action "for the purpose of preventing or hindering to all persons within such State or Territory the equal protection of the laws".

Petitioners here held the hearing before the Tenney Committee for the very purpose of preventing the California Legislature from taking up the matter of Brandhove's petition. By staging a purported investigation with witnesses called and purported evidence read into the record thereat, the matter was for all practical purposes taken out of the hands of the California Legislature and prejudged by the Tenney Committee which threw it into the lap of the Courts thus making any investigation by the Legislature futile. Hence the Committee acted for the purpose of preventing or hindering the constituted authorities of the State of California from giving Brandhove the

benefit of equal protection of the laws—a violation of the terms of Section 47(3).

IV.

UNDER THE CIVIL RIGHTS STATUTES, THE FEDERAL COURTS ARE EMPOWERED TO DETERMINE WHETHER A STATE LEGISLATIVE COMMITTEE OR ITS MEMBERS HAVE VIOLATED THE FEDERAL RIGHTS OF ANOTHER BY INTENTIONAL ABUSE OF STATE POWER.

(A) The power of the Federal Courts to protect Federal rights under the Civil Rights Statutes extends to anyone clothed with State power who intentionally deprives a citizen of his Federal rights.

Where State power is used for such an end, the abuse cannot be excused by the fact that the same power could have been used for a proper end. As stated by Mr. Justice Holmes speaking for this Court in *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114:

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, U. S. v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

It is axiomatic that the same power which may be constitutionally exercised under one set of facts, becomes unconstitutional and unlawful if exercised under different circumstances.

In the instant case we are not concerned with the investigatory and inquisitorial power of State Legis-

lative Committees for an end that is lawful under the Federal law. We are here concerned with an exercise of such State power for an unlawful end, namely, to deprive a citizen of fundamental Federal rights. The question here involved is not the motive[10] of the Committee and its members, but is whether or not they acted with the intent and for the purpose of silencing a political opponent by abuse of State power.

Where the invasion of Federal constitutional rights is at issue, the scrutiny of the Federal Courts extends of necessity to factual questions, such as intent, deliberate planning and malice. As stated in *Oyama v. California,* 332 U.S. 633, 636:

> "In approaching cases such as this one, in which federal constitutional rights are asserted, it is incumbent on us *to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.*" (Emphasis added.)

In the *Oyama* case this Court referred to *Patton v. Mississippi,* 332 U.S. 463, 465, where the impact of the principle against deliberate exclusion of Negroes from a jury was stated as follows:

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[10] "'Motive' and 'intent' are not identical, and an intent may exist where a motive is wanting. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. In the popular mind, intent and motive are often regarded as the same thing, but in law there is a clear distinction between them. • • •" Black's Law Dictionary, 3rd Ed., p. 1209, and cases there cited.

"A long and unbroken line of our decisions * * * has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.' *Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case.*" (Emphasis added.)

See also:

Shelley v. Kramer, 334 U.S. 1.

In *Norris v. Alabama,* 294 U.S. 587, the evidence as to whether Negroes had been discriminated against in the selection of grand juries was conflicting. Chief Justice Hughes, writing for the Court, said at pages 589, 590:

"The question is of the application of this established principle [equal protection] to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state

> court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

This same rule has been announced in numerous other cases, many of which are collected in footnote 4 of the dissenting opinion of Mr. Justice Black in *Feiner v. New York*, 95 L. Ed. Adv. Op. 257, 258.

If, as alleged by Respondent, the Committee in question and its members acted with such intent and for such unlawful end, they cannot escape the sanctions of the Civil Rights Statutes and the word "motive" cannot be used as a magic wand to obliterate the manifest purpose of the Federal Constitution and those Federal statutes enacted to protect civil rights.

See:

Cook v. Marshall County, 196 U.S. 261, 271 infra.

(B) The doctrine of separation of powers, important as it is in determining judicial review of acts of Congressional committees by Federal Courts has no application where the issue is abuse of State power in collision with Federal rights.

In the instant case we are not concerned with the question whether Federal Courts can check the abuse of the powers of Congress and Congressional Committees, or whether the principle of separation of powers bars the Federal Courts either absolutely or

to some extent from such review. If *State action,* as distinguished from Federal governmental action, is involved, the Federal Courts are not barred from exercising their power to protect the Federal rights of citizens regardless of whether the asserted violation of such rights emanates from the legislative branch or any other branch of the State government. "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U.S. 673, 680; *Shelley v. Kramer,* 334 U.S. 1, 15.

V.

THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE TENNEY COMMITTEE IS UNCONSTITUTIONAL.

The California Senate resolution creating The Tenney Committee (R. 12-18) violates the due process clause of the Federal Constitution, Amendment Fourteen, in that it lacks the degree of certainty which is required in a statute or other rule of State law where it is applied to affect such fundamental rights as freedoms of speech, petition, honor, opportunity to earn a living and privacy.

See:

Kunz v. New York, 95 L.ed. Adv. Op. 240;

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;
In re Di Torio, 8 F. (2d) 279, 281;
Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

Petitioners allude to fact that the constitutionality of the instant resolution was also attacked in *Vern Smith v. California*, 336 U.S. 957, and that the Court dismissed an appeal from the Superior Court of Alameda County, California, for want of a substantial federal question (Brief for Petitioners, p. 10). Such was also a contention in the *Kunz* case where the New York ordinance there in question had been previously challenged in *People v. Smith*, 263 N.Y. 255, 188 N.E. 745 and an appeal was dismissed for want of a substantial federal question (*Smith v. New York*, 292 U.S. 606). In *Smith v. New York*, 292 U.S. 606, as in *Vern Smith v. California*, 336 U.S. 957, the attack on the constitutionality of the respective enactments was made in the abstract rather than with regard to the application of the enactments to concrete facts involving arbitrary action on the one side and fundamental liberties on the other.

Petitioners' contention that the California Supreme Court made a ruling on the constitutionality of the instant resolution by denying Respondent's application for a writ of habeas corpus after his arrest and imprisonment, is clearly erroneous. This writ was applied for *prior to the trial* which led to Respondent's discharge and the California Court simply did not exercise its discretion, vested in the Court in ex-

traordinary cases, to grant a writ of habeas corpus in advance of trial.

See:

In re Bell, 19 Cal. (2d) 501;

Rescue Army v. Municipal Court, 28 Cal. (2d) 460.

The issue of the constitutionality of said resolution is raised however only in the alternative; it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of the resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

VI.

RESPONDENT IS ENTITLED TO TRIAL ON HIS COMPLAINT.

It appears from the foregoing discussion that respondent has stated a claim for relief under the Civil Rights Statutes.

We deem it unnecessary to discuss niceties of pleading since under Rule 8 (f), F.R.C.P., all pleadings shall be construed as to do substantial justice. As stated in *Maty v. Grasselli Chemical Co.,* 303 U.S. 198, 200:

> "Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

Under Rule 8a (2), F.R.C.P., a short and plain statement of the claim showing that the pleader is entitled to relief is sufficient. There is no requirement that the pleadings state facts or ultimate facts or fact sufficient to constitute a cause of action.

See:

Dioguardi v. Durning (C.A. 2), 139 Fed. (2d) 774, 775.

Wherever the Federal Civil Rights Statutes apply, damages are recoverable as well as injunctive relief.

See:

Picking v. Penn. Ry. Co., 151 F. (2d) 240, 249;
Chapman v. King, 154 F. (2d) 460;
Bomar v. Keyes, 162 F. (2d) 136;
Brickhouse v. Brooks, 165 F. (2d) 534;
Gordon v. Garrson, D.C. Ill. (1948), 77 F. Supp. 477.

Where grave constitutional issues are involved, it is the policy of the Federal Courts, rather than to refuse relief on demurrer or equivalent motion, to postpone such determination until evidence of the actual facts are before the Court. See: *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213 (concurring opinion By Mr. Justice Stone and Mr. Justice Cardozo). See also: *Williams v. Miller*, 48 Fed. Supp. 277, 280.

In answer to Respondent's contentions, Petitioners use the method of isolating their actions; arguing that some were not deprivative of Respondent's federal rights and others were not accomplished under color of State law. This argument not only overlooks the existence of a common plan pleaded in the complaint,

but also ignores the fact that the entire conduct of Petitioners is an inseparable whole and was engaged in for the single purpose of intimidating, vilifying, and silencing Respondent.

Respondent's pleading, in essence, asserts that all actions taken by petitioners against him were not merely coincidental to some lawful course of conduct, but, as pleaded, served one sole purpose, namely, to single out Respondent for deprivation of his fundamental rights. It is outside of the issues of this case to discuss the degree of culpability required by the Civil Rights Statutes for civil liability. There can be no question that malicious and arbitrary State action taken for the sole purpose of defeating federally secured rights is within the civil liability provisions of the statutes. Fair warning to all potential wrongdoers wielding state power was given by such cases as *Screws v. United States*, 325 U.S. 91; *Hague v. C.I.O.*, 307 U.S. 496; *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240; *Burt v. City of New York* (2 C.A.), 156 Fed. (2d) 791, and others.

CONCLUSION.

In this case the state of facts, as well as the object of the Tenney Committee, are patent. If, nevertheless, these facts do not bring forward the exercise of Federal judicial power to stop such abuse of State power in violation of fundamental Federal rights, the result would be a complete denial of such rights where State legislative committees are infringing them. In

effect, it would then be written into the Constitution of the United States that the right of free speech and the right to petition the legislature for a redress of grievances, are guaranteed only if they are not exercised in opposition to such an omnipotent legislative committee as the California Senate Committee on Un-American Activities.

From the foregoing it is respectfully submitted that Respondent's complaint states a claim for relief against Petitioners and, therefore, the decision of the District Court should be reversed, and, with regard to Petitioners, the decision of the Court of Appeals should be affirmed.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,
MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
GEORGE OLSHAUSEN,
Attorneys for Respondent.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

(1) Title 8 U.S.C. section 43:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(2) Title 8 U.S.C. 47(3):

"Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice Presi-

dent, or as a member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(3) 18 U.S.C. 241:

"Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5000.00 or imprisoned not more than ten years, or both."

(4) 18 U.S.C. 242:

"Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance regulation, or custom, wilfully subjects any

inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalities, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both."

(5) Federal Rules of Civil Procedure, 28 U.S.C. Rules:

Rule 8 (a) (2):

(a) "Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *."

Rule 8 (f):

(f) "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice".

Rule 9 (b):

(b) "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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Committee on Un-American Activities, a California Legislative Committee, Jack B. Tenney, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, all of which named persons were as of the time concerning which the complaint speaks and at the time of the filing of the complaint duly elected and qualified members (State Senators) of the State Senate of California and members of the above-named Committee, and from Elmer E. Robinson, who was at the time of the filing of the complaint and is now the Mayor of San Francisco, California, a defendant but not a petitioner, damages in the amount of $250,000.00 for alleged violation of respondent's claimed rights under and by virtue of the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A.

Summarizing the complaint, it appears that respondent sued under Sections 43 and 47(3) of Title 8 U.S.C.A. to recover damages for alleged violations of his claimed civil rights. The petitioners, defendants in the complaint filed in the United States District Court, are members of The Senate Fact-Finding Committee on Un-American Activities, a California Legislative Committee, sometimes referred to as "The Tenney Committee of the California State Senate", empowered by a resolution adopted in 1947 to inquire into Un-American activities. The remaining defendant is Mayor Robinson of San Francisco.

The pleading avers: "On January 28, 1949, plaintiff (respondent) circulated a petition entitled: 'A Protest Against a renewed Appropriation for the California Senate Committee on Un-American Ac-

tivities (The Tenney Committee)' among the members of the Legislature of the State of California at the State Capitol in Sacramento. * * * and the purpose of said petition, as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff (respondent) was engaged in circulating said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to-wit: January 29, 1949." (R. 4.)

The protest or petition goes on to charge that the Committee had "used" respondent (plaintiff) "as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end." The particulars of the charge contained in the protest are lengthy.

The petition or protest and the subpoena are made parts of the complaint and appear respectively on pages 18 and 22 of the Record.

It is to be noted that pursuant to a requirement of the State Constitution, the Legislature of the State of California adjourned for a period of thirty (30) days, commencing at 3:00 p.m. on January 29, 1949, and, hence, was in recess at the time fixed for respondent's appearance.

In the Supreme Court
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JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

STATEMENT OF THE CASE.

This case is here on writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that Court which reversed a

judgment of the Southern Division of the District Court of the United States for the Northern District of California dismissing the complaint of plaintiff in said Court.

A. Reference to the Official Report of the Opinion of the Court Below.

The opinion of the United States Court of Appeals for the Ninth Circuit will be found in the Record at page 137 and is reported in 183 Fed. 2d, 121.

B. Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U.S.C.A. which in its pertinent language provides:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The date of the judgment of the Court of Appeals herein sought to be reviewed was June 30, 1950. (R. 147.)

C. Concise Statement of the Case.

Summary Statement of the Matter Involved.

The Court of Appeals has reversed the judgment of the District Court, dismissing the action brought by the respondent in so far as it relates to petitioners for the failure of the complaint to state a cause for relief.

The complaint of respondent (R. 3-75) sought to recover from petitioners, The Senate Fact-Finding

It is further to be noted that the complaint alleges no interference with the circularizing of the petition other than the service of the subpoena above referred to. At the time fixed for his appearance in the subpoena (R. 22), respondent appeared with his counsel, J. Francis O'Shea, Assistant Attorney General of the State of California, representing the Attorney General's Office of the State of California, and A. C. Morrison, Deputy Legislative Counsel, representing the Office of Legislative Counsel of the State of California, were also present and advised the Committee during the hearing. Upon being sworn as a witness, respondent gave his name, residence and occupation and then stated to the Committee that he was represented by counsel and would like to act under his advice. Counsel for respondent then commenced to read, and later filed with the Committee, the so-called "* * * protest against a renewed appropriation for the California Senate Committee on Un-American Activities * * *" (R. 29). Next counsel for respondent stated objections to the Committee.

One of the grounds of objection was that "* * * the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation." Other grounds were that respondent had been subpoenaed because of the charges made in his petition to the Legislature; that the Committee was not and could not be a fair and impartial tribunal; that it was engaged in a political and not a legislative investigation in attempting to acquit itself of respondent's charges; that a joint com-

mittee of the Assembly and Senate was the only proper body to investigate such charges; and that the Committee had itself vouched for respondent's veracity by releases and reports in the past. The objections were overruled by the Chairman, but respondent was instructed by his counsel not to respond to questioning. The Chairman then inquired of respondent, "Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?"; to which the answer was, "On advice of Counsel, I will not, no, sir." (R. 30-32.)

The witness thereupon answered questions relating to his signature to the so-called protest. Respondent was then asked, "Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?" "A. I refuse to answer any and all questions on advice of counsel." (R. 38.) The respondent then was further and at length interrogated in connection with whether he knew or was acquainted with certain people, including R. E. Combs and Franck Havenner, two of the persons mentioned in his petition. (R. 19.) To all of these questions the witness refused to answer. A motion was made to hold the witness in contempt. Thereupon the Chairman of the Committee referred to an affidavit of respondent of December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit respondent, among other things, admits being a former member of the Communist Party, and specifically that he was induced to become a member of the Communist Party by Frank McCormick and

Hugh Bryson in San Francisco, and after joining the Communist Party he carried out Communist activities. Reference was made to other activities of respondent in connection with evidence presented to the Committee. The Chairman thereupon stated for the record that Brandhove had a criminal record, in the course of which he recounted crimes with which he said respondent had been charged in various cities over a period ranging from 1930 to 1947, including, among other things, charges of sodomy, grand theft, burglary, malicious mischief, and defrauding an inn-keeper. This statement is alleged in the complaint to have been false.

Reference was then made by the Chairman to other affidavits made by respondent and to a newspaper article in which one of the affidavits referred to by the Chairman had been characterized by a Mr. Nicholson as "a tissue of lies" (R. 45), and could be so proved.

The respondent was then asked if he was acquainted with Congressman Havenner's secretary. He refused to answer on advice of counsel. He was then asked, "Does the Army Transport Service in San Francisco have a record of your activities?" (R. 45.) Again respondent refused to answer on advice of counsel. The interrogation of respondent was then dropped and the witness was permitted to leave the stand. At the same hearing the Mayor of San Francisco, Robinson, was called and testified at length in repudiation of the charges Brandhove had made against him which appeared in his so-called protest.

After respondent, Brandhove, had left the witness stand, and when the Mayor of San Francisco, Elmer E. Robinson, was called to testify, Mr. Jarvis, the attorney for Mr. Brandhove, the respondent, attempted to interject his views and make objections to the Committee's calling Mayor Robinson as a witness. It was then and not until then that the Committee interrogated Mr. Jarvis as a witness. (R. 47-50.)

During the course of the session the Committee resolved that a complaint be filed in the proper Court charging respondent with a misdemeanor in refusing to answer questions. This course was followed and respondent was later arrested on a warrant based upon a complaint signed by the Chairman and was confined in jail from February 1 to February 15, 1949. A trial of the charge before a jury on March 5, 1949, resulted in a disagreement, and the case was dismissed four days later on motion of the district attorney.

Respondent's complaint pieces together these proceedings and incidents, plus the sending by the Committee of two telegrams to the district attorneys of San Francisco and Alameda counties. They refer to Brandhove's charges circulated among the legislators and to sworn testimony of Brandhove earlier given before the Committee, said in the telegrams to be inconsistent or at variance with the charges. The officials addressed are urged to charge Brandhove with perjury or to have the matter presented to the grand jury of their respective counties.

The pleading then alleges (R. 8) that respondent had committed no public offense at said Committee hearing on the grounds that the resolution creating the Tenney Committee if read into a criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949, was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of respondent, to-wit, his rights of free speech and to petition the Legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to respondent, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating the Tenney Committee; that the questions asked of respondent at said hearing were not material and proper as required by Section 9413 of the California Government Code.

The pleading goes on to allege that the acts of petitioners above set forth were done or participated in by said petitioners with malice and intent to intimidate and silence respondent and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of

of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, prevent and deprive respondent.

The complaint then charges that the acts of these petitioners were done under color of the authority conferred upon them by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said Committee.

Allegations in respect to damages, actual and punitive, claimed in the sum of $250,000.00 conclude the complaint.

(Note: We are indebted to the opinion of the Circuit Court of Appeals in a large part for the present summarization of the complaint.)

REFERENCE TO RELEVANT PROVISIONS OF CALIFORNIA STATUTORY AND CASE LAW.

No serious claim is made by respondent that the resolution creating The Senate Fact-Finding Committee on Un-American Activities is unconstitutional. The resolution appears in the Record at page 12. The question of unconstitutionality of this resolution was presented to the Court in the case of *Vern Smith v. The People of the State of California*, 336 U.S. 957. The Court decided:

> "Appeal from the Superior Court in and for the County of Alameda, State of California.
>
> * * * * * * *

April 25, 1949. PER CURIAM: The appeal is dismissed for want of a substantial federal question."

Further, the Supreme Court of the State of California, upon an attack by respondent, after his arrest as set forth in his complaint, on the constitutionality of the resolution creating the Tenney Committee, ruled against respondent on this subject by denying his application for a writ of habeas corpus. (See minutes of Supreme Court of California, February 14, 1949, 33 A.C. 454.)

Article IV, Section 2, of the Constitution of the State of California, relating to meetings of the legislature of that state, provides, among other things, that:

> "All general sessions shall commence at 12 o'clock m., on the first Monday after the first day of January and shall continue for a period not exceeding 30 days thereafter; whereupon a recess of both Houses must be taken for not less than 30 days."

The following concurrent resolution was adopted by the State Senate of California:

> "SENATE CONCURRENT RESOLUTION No. 26
> CHAPTER 76
>
> Senate Concurrent Resolution No. 26—Relative to adjournment of the Legislature for the constitutional recess, and to the reassembling of the

Legislature after said recess, and fixing the date for said adjournment and said reassembling.

(Filed with Secretary of State February 3, 1949.)

WHEREAS, Section 2, of Article IV of the Constitution of this State requires that, after the Legislature has been in session for a period of not exceeding thirty days a recess must be taken by both houses for a period of not less than thirty days, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the 1949 Regular Session of the Legislature of the State of California shall adjourn for said recess at 3 o'clock p.m. on the twenty-ninth day of January, 1949, and shall reassemble at 12 o'clock m. on March 7, 1949."

At the time of the occurrence of the events alleged in the complaint, the Government Code of California then and for some time prior thereto had and does now provide as follows:

"9401. A subpoena requiring the attendance of any witness before the Senate, Assembly, or a committee may be issued by the President of the Senate, Speaker of the House, or the chairman of any committee before whom the attendance of the witness is desired."

"9402. A subpoena is sufficient if it:

(a) States whether the proceeding is before the Senate, Assembly, or a committee.

(b) Is addressed to the witness.

(c) Requires the attendance of the witness at a time and place certain.

(d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired."

"9405. If any witness neglects or refuses to obey a subpoena, or appearing, neglects or refuses to testify, or to produce upon reasonable notice any material and proper books, papers or documents in his possession or under his control, he has committed a contempt."

"9410. A person sworn and examined before the Senate or Assembly, or any committee, cannot be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify. Any statement made or paper produced by such witness is not competent evidence in any criminal proceeding against the witness. The witness can not refuse to testify to any fact or to produce any paper touching which he is examined for the reason that his testimony or the production of the paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution and punishment for perjury committed by him on examination."

"9412. Every person who, being summoned to attend as witness before the Senate, Assembly, or any committee, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before the Senate, Assembly, or any committee, wilfully refuses to be sworn, to answer any material and

proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control is guilty of a misdemeanor.

Every member of the Legislature convicted of a misdemeanor under this section, in addition to the punishment prescribed, forfeits his office and is forever disqualified from holding any office in the State."

It is the law of California that a legislative committee can, with complete propriety, inquire into any subject matter which arises impugning its own integrity. (*Ex parte McCarthy*, 29 Cal. 395.) The respondent, as a witness before the Committee, had no right to be represented by counsel, for such right of a witness at a legislative inquiry is a matter of grace, not of right. (*Ex parte McCarthy*, 29 Cal. 395, 402.)

Under the law of California, a witness may not be compelled before a legislative committee to answer questions propounded by it to the witness unless the investigation was so far legislative in character as to have empowered the committee to ask to have answered the questions propounded.

In re Battelle, 207 Cal. 227, 257.

We can say without fear of contradiction the statutory and case law of California is zealous in safeguarding the rights of witnesses before legislative committees.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in reversing the judgment of the District Court.

2. The Court of Appeals erred in holding that the complaint stated a claim for relief under the provisions of Sections 43 and 47(3) of Title 8, U.S.C.A.

3. The Court of Appeals erred in holding that the judiciary may inquire in the motives of the Legislature of the State of California and of its committees while acting in the discharge of their duties as such.

4. The Court of Appeals erred in holding that acts of a legislative committee of the Legisla re of the State of California, lawful in and of themselves, when tested by the laws of the State of California and of the United States, may constitute an abuse of power because of the motives of the members of the committee.

5. The Court of Appeals erred in holding that the conduct of the petitioners deprived respondent of a federally protected right.

6. The Court of Appeals erred in holding that the provisions of Sections 43 and 47(3) of Title 8, U.S. C.A., applied to the official acts of the legislative committee of a state legislature.

7. The Court of Appeals erred in holding that the circulation of a petition by a citizen of the State of California among members of the Legislature of the State of California seeking to induce the legislators not to appropriate funds for a legislative committee

was a right, privilege or immunity secured to the citizen of the State by the Constitution and laws of the United States.

8. The Court of Appeals erred in holding in effect that the complaint charges that the respondent was deprived of a right, privilege or immunity secured to him by the Constitution and laws of the United States, when the right, privilege or immunity, if existent theretofore, admittedly had been exercised by respondent.

ARGUMENT.

I.

SUMMARY OF ARGUMENT.

The sequence of our argument has no relation to the importance of one subject over another.

A.

Under the heading of "Legal Questions Presented", we urge to the Court that the right to petition the California State Legislature is not a right secured under the Fourteenth Amendment but is rather a right existing between a citizen of the state and his own state government. Preserving the sovereignty of the state is a matter as essentially important as any other subject which may come to the Court for review.

B.

We urge to the Court that legislators are immune from civil liability for their actions in discharge of

their public duty. This immunity is part of constitutional government and is a right existing in the legislators and in the people. The people are entitled, under a republican form of government, to have legislators answerable only to them for the manner in which they discharge their public duty. We urge that it was never the intention of the people in the ratification of the Fourteenth Amendment to impliedly repeal this right. Certainly, the enactment of the Bill of Rights did not repeal the fundamental right of congressmen to immunity from civil liability for acts performed in discharge of their public office.

C.

In a republican form of government constitutionally providing for the equal division of power, there exists no power in the judiciary to review the intent which prompts a member of the Legislature to act in the discharge of his office and trust. This principle has been continuously observed and has been particularly recognized by the Courts of the United States in numerous decisions in the last few years.

D.

A decision which holds, as does that of the Court of Appeals in the instant case, that the Civil Rights Act gives a cause of action on the theory that punishment for having exercised a constitutional right is the equivalent of deprivation of the right is an erroneous construction of Section 43, Title 8, U.S.C.A. The Congress, at the time of enacting this section, had very clearly in mind the matter of punishment for

having exercised a federally protected right, and its omission from Section 43 must be deemed intentional.

The pleading and the facts clearly existent here do not show punishment or reprisal within the meaning of the law. The respondent here exercised his constitutional right. After exercising it, all that happened was that he was subpoenaed to appear as a witness, and from then on a lawful hearing was had and there was put in motion the due processes of law of the State of California. The processes of law put in motion were not oppressive but were the ordinary processes of law which would have been put in motion in respect to any person who had conducted himself in the manner in which respondent conducted himself at the hearing before the Legislative Committee.

II.

ANALYSIS OF COMPLAINT.

It is essential to analyze the facts pleaded for the purpose of determining:

(A) The rights which respondent claims he was deprived of;

(B) The manner in which respondent claims he was deprived of rights or a right; and

(C) Has the respondent pleaded a cause of action for reprisal for having exercised a constitutional right.

(A) The rights which respondent claims he was deprived of.

The complaint, paragraph 13 (R. 10), contains an allegation that the acts of defendants above set forth were done or participated in by said defendants with malice and intent to deter and prevent him from effectively exercising his constitutional rights, namely:

(1) the right of free speech;

(2) the right to petition the legislature for redress of grievances;

(3) the equal protection of the laws;

(4) due process of law; and

(5) the enjoyment of equal privileges and immunities of a citizen of the United States under the law.

In respect to equal protection of the laws, it is quite clear that a violation of this right did not arise in connection with the manner, facts, or circumstances under which respondent circulated his petition; nor did it arise in connection with the service upon him of the process (subpoena) of the State of California, which conformed to the regular, orderly and statutory laws on the subject of subpoenaing a witness before a legislative committee; nor did it arise in connection with the hearing before the Committee.

Until the respondent became a difficult and contumacious witness, he was treated with respect and his counsel was treated with consideration. He became at the very outset a contumacious witness. The situation which developed before the Committee was engendered and brought about by respondent's own conduct. The

subsequent determination by the Committee to charge him with the offense which, it would appear, he clearly committed in its presence is not nor is it alleged to be different treatment from that the State Legislature, acting through a committee, would follow in respect to any other witness similarly conducting himself.

All that the Committee did was to set in motion the orderly processes of the state government of California under which the witness would be punished only if he were guilty of a violation of the statutory law in respect to the conduct of the Committee (Sections 9405 and 9412, Government Code of California, supra), and under which every legal right which he may have had before the Committee was protected under the law.

Further allegations in the complaint in respect to the manner in which the hearing was conducted have little significance when applied to a legislative committee hearing at which no judgment, order or any other edict of the committee could in any way affect the property or liberty of the witness.

In this connection it is well to remember that a legislative committee hearing is not an adversary proceeding, and that the only thing it can affect is the proposal, passage or defeat of legislation.

Plaintiff's complaint, paragraphs 7 and 8 (R. 6 and 7), among other things, alleges that the purpose and object of the hearing of the Tenney Committee was "* * * to the end that said committee should

obtain the appropriation of funds requested from the California Legislature."

In conducting said hearing the Legislature is not to be restricted by the fact that methods and processes generally employed in judicial or quasi-judicial proceedings are used.

In re Battelle, supra;
McGrain v. Daugherty, 273 U.S. 135.

Article IV, Section 1, of the Constitution of California, provides:

> "The legislative power of this State shall be vested in a Senate and Assembly, which shall be designated 'The Legislature of the State of California,' * * *"

Article IV, Section 9, of the Constitution of California, provides:

> "Each House shall determine the rule of its proceeding, * * *"

A consideration of the complaint, with the foregoing points in mind effectively disposes of the conclusion of respondent that he was deprived of equal protection of the law, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States, except insofar as either may relate to the right of free speech and the right to petition the Legislature for the redress of grievances.

The foregoing is completely consistent with the view expressed by the Circuit Court in the instant case and in the cases of:

Barsky v. United States, 167 F. (2d) 241;
Dennis v. United States, 171 F. (2d) 986;
Eisler v. United States, 170 F. (2d) 273;
United States v. Josephson, 165 F. (2d) 82.

It is obvious that the loosely used phrases, "equal privileges and immunities," and "the equal protection of the law," were inserted in the complaint because Section 47(3) Title 8 U.S.C.A. has similar language. Section 47(3) Title 8 U.S.C.A. provides as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or prop-

> erty, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

We have pointed out above that there are no facts alleged in the complaint, nor any substantive allegations, which bring the case within the provisions of said Section 47(3). The Courts of the United States have consistently distinguished between the right of action conferred under Section 43 and the right of action under Section 47(3).

See:

Mitchell v. Greenough, 100 F. (2d) 184;
McShane v. Moldovan, 172 F. (2d) 1016;
Snowden v. Hughes, 321 U.S. 1.

(B) The manner in which respondent claims he was deprived of rights or a right.

The Circuit Court, in its decision in the instant case, holds that the defendants did not prevent respondent from exercising the right which the Court declared he had. It is clearly true that if any constitutional right of respondent is involved in this case, he did exercise it.

The respondent, however, in his complaint makes certain claims. Stripped of superfluous language, the complaint alleges that a series of acts of defendants deprived him of the right of free speech and the right

to petition the Legislature for redress of grievances by fear induced by:

(1) the service of a subpoena;

(2) the holding of an allegedly unfair hearing in the course of which he was allegedly denied procedural due process; and

(3) the determination by the Committee to file a complaint charging him with violation of Section 9412 of the Government Code.

It will appear in our treatment of Subdivision (A) above that the manner in which respondent claims he was deprived of his constitutional rights does not show a deprivation of any constitutional right at all.

(C) Has the respondent pleaded a cause of action for reprisal for having exercised a constitutional right.

It is clear from the complaint that the respondent's cause of action is based, as pleaded, upon the claim that the series of acts alleged to have been committed by the defendants were acts which *deprived* him of constitutional rights.

In his conclusions, as distinguished from facts, he charges defendants with conduct done for the purpose of intimidating and silencing him and deterring and preventing him from exercising his constitutional rights.

The conclusions in the complaint are inconsistent with the pleaded facts which show the right of respondent, which he claims was a constitutional right, was exercised.

The theory of deprivation of a constitutional right by reprisal, after the right has been exercised, has been interjected into this case by the decision of the Court of Appeals.

III.

LEGAL QUESTIONS PRESENTED.

A.

THE RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT SECURED TO THE RESPONDENT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

1. The facts pleaded disclose that if any constitutional right of the respondent was involved, it was the right to petition the legislature.

Regardless of the language contained in the complaint, it appears without question that the respondent was engaged in the act of circulating among the Legislators of the State of California a petition containing a protest highly critical of the members of the Legislature and petitioning the members that they do not appropriate further money for the Committee. Respondent did not circulate his petition among members of the public; nor did he make any attempt to do so; nor did he allege any intention of doing so. Respondent did not address, nor attempt to address any group of Legislators or public or private group, nor did he allege that he attempted so to do or that he had the intention of so doing. He was engaged in the single act of petitioning the Legislators of the State of California in reference to a matter pending

before that body, namely, the appropriation by the Legislature of state funds for state purposes.

There exists under constitutional government the right in the citizen to petition for the redress of grievances. It is a right distinct and separate from freedom of speech and the right to assemble, both of which exist in the individual.

It will be observed that the right of freedom of speech and the right to petition the government for the redress of grievances are expressed in different clauses of the First Amendment to the Constitution of the United States and different sections of the Constitution of the State of California.

The First Amendment to the Constitution of the United States provides:

> "Article I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Sec. 9 of the Constitution of the State of California provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

Article I, Sec. 10 of the Constitution of the State of California provides:

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances.'".

2. The right to petition the California legislature is not secured to the respondent by the Constitution or laws of the United States.

Although the right to petition the government is a fundamental one, it is a right limited to the citizen. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California, but rather secured to the citizens of each sovereign by the constitution thereof. It is to be observed that the fundamental rights of freedom of religion, freedom of speech, or of the press; and the right to assemble peaceably, are rights within the man himself, unrelated to place, time, or a particular person or political body. The right to petition the government for redress of grievances arises from the relationship of the citizen and his government. Clearly, a citizen of the United States has the right to petition his government, and, with equal clarity, it appears that the Fourteenth Amendment, having in mind the construction placed upon it by the Supreme Court of the United States, prevents any State from depriving a person of that right.

We do not have here any action under the color of State authority abridging or in any manner interfering with the right of a citizen of the United States to petition his government.

The State of California has protected its citizens by enacting into its Constitution the right to petition

its Legislature. The right to petition the Legislature of the State of California is a matter of state concern exclusively. Just as the Fourteenth Amendment prevents persons acting under color of State authority from interfering with the right of the citizen of the United States to petition his government, so does the Tenth Amendment reserve the power in the State or its people in respect to the subject matter of petitioning its Legislature. The Tenth Amendment provides:

> ARTICLE X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is to be observed that the right to petition the federal government for redress of grievances has been the subject matter of discussion in the Congress in the early days of our Republic, and the Court will have in mind that Congress in its early days was deluged with petitions from Abolitionists. Prior to that time Congress had a practice of, at regular intervals, having members bring to the attention of the Congress matters of grievances coming from the people. These grievances were made a part of the record. Because of the overwhelming number of these petitions, the Congress over the protest of some States, tabled all of them without action and without printing them in the Congressional Record or at all. (See Congressional Debates relating to Atherton's Resolution of December 12, 1838, Congressional Globe, 25th Congress, 3rd Session, Vol. VII.)

If Congress passed a statute relating to the form and manner and procedure to be employed in peti-

tioning for the redress of grievances against the government, would the State of California be bound to follow it in respect to action by its citizens under its State Constitution? If the State passed a law relating to the form and manner and procedure to be employed in petitioning the Legislature of the State for redress of grievances, is it within the jurisdiction of a Federal Court to declare it a nullity? Reason dictates that the rights are separate and apart.

There still exists a distinction between the State and Federal government. Little distinction will remain if Congress can legislate upon the subject of the manner of how the State handles the right of its citizens to petition its Legislature.

Cases which have a bearing on this subject and which sustain the views here expressed are:

United States v. Cruikshank, 92 U.S. 542, 552;
Crandall v. State of Nevada, 73 U.S. 35, 44.

It will be observed in the case of *Hardyman, et al., v. Collins*, 183 F. (2d) 308, certiorari granted in your Court, that the pleader in that case was very explicit to claim that the subject matter of the meeting related to federal questions. It is respectfully submitted that the right to petition the State Legislature is not one of the rights set out in the Bill of Rights; further, the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights. These rights are many; here are a few:

Right to trial by jury in a State Court.

Maxwell v. Dow, 176 U.S. 581.

Freedom from unreasonable searches and seizures.

(a) This inclusion is debatable under the decision in

Wolf v. People of the State of Colorado, 338 U.S. 25.

Right to indictment by Grand Jury.

Maxwell v. Dow, supra.

Prohibition against self-incrimination.

Adamson v. People of State of California, 332 U.S. 46.

Right to be charged by indictment in felony cases.

Hurtado v. People of State of California, 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the national and state power. As stated in the *Adamson* case, supra, at pages 51 and 53:

> "The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672; Feldman v. United States, 322 U.S. 487, 490, 64 S. Ct. 1082, 1283, 88 L. Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal pro-

tection for their elemental privileges and immuni
ties of state citizenship. The Slaughter-Hous
Cases decided, contrary to the suggestion tha
these rights, as privileges and immunities of stat
citizenship, remained under the sole protection o
the state governments. This Court, without th
expression of a contrary view upon that phase o
the issues before the Court, has approved thi
determination. Maxwell v. Bugbee, 250 U.S. 525
537, 40 S. Ct. 2, 5, 63 L. Ed., 1124; Hamilton v
Regents, 293 U.S. 245, 261, 55 S. Ct. 197, 203, 7
L. Ed. 343. The power to free defendants i
state trials from self-incrimination was specifi
cally determined to be beyond the scope of th
privileges and immunities clause of the Four
teenth Amendment in Twining v. New Jersey, 21
U.S. 78, 91-98, 29 S. Ct. 14, 16-19, 53 L. Ed. 97
'The privilege against self-incrimination may b
withdrawn and the accused put upon the stand a
a witness for the state.' The Twining case like
wise disposed of the contention that freedom from
testimonial compulsion, being specifically granted
by the Bill of Rights, is a federal privilege o
immunity that is protected by the Fourteenth
Amendment against state invasion. This Cour
held that the inclusion in the Bill of Rights o
this protection against the power of the nationa
government did not make the privilege a federa
privilege or immunity secured to citizens by th
Constitution against state action. Twining v. New
Jersey, supra, 211 U.S. at pages 98, 99, 29 S. Ct
at page 19, 53 L. Ed. 97; Palko v. Connecticut
supra, 302 U.S. at page 328, 58 S. Ct. at page 153
82 L. Ed. 288. After declaring that state and
national citizenship co-existed in the same person

the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States*, 238 U.S. 347:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In

fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

Cf. *Breedlove v. Suttles*, 302 U.S. 277.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle, namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state, not national, citizenship, and is not secured to a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1.

It necessarily follows that the right involved in the present pleading being the right to petition the State Legislature, the respondent stated no cause or claim for relief. The right claimed violated was his right as a citizen of the State of California in relation to his state government. That right is not conferred upon him by the United States Constitution, nor guaranteed to him by the Fourteenth Amendment. Therefore, Congress could not, and has not, in Sections 43 and 47(3), Title 8, U.S.C.A., created a cause of action against a state officer for violating that right.

B.

THE LEGISLATORS OF THE STATE OF CALIFORNIA ARE IMMUNE FROM CIVIL LIABILITY.

Article IV, Section 4, of the Constitution of the United States provides, among other things, as follows:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, * * *"

We respectfully submit that there is squarely presented to the Court in this case the question of whether the duly elected members of a State Legislature are immune from civil liability for acts done or performed and statements made in the discharge of their duties.

We dismiss as untenable any claim that the facts alleged in relation to a member or members of the Committee sending telegrams to district attorneys suggesting the prosecution of the respondent for perjury and the act of a member of the Committee in holding a claimed conversation with the Mayor of San Francisco are acts which could possibly give rise to a cause of action under the Civil Rights Act; this, whether they are considered as isolated acts or are considered in connection with other pleaded facts. We are concerned here in the pleaded facts with a case which brings under scrutiny a hearing lawfully held for a lawful purpose and pursuant to constitutional authority of the State of California.

It is to be observed that the people formed a constitutional government, denominated a "republican"

form of government. The people forming the government reserved unto themselves certain fundamental rights which continued to exist in them after the adoption of a constitution which was a delegation of power and after the adoption of the Bill of Rights containing a limitation on the power of the government.

The constitutional government formed followed a known historical pattern of division of power between the executive, judicial, and legislative branches of the government. At the time of the formation of this government there was inherent a known immunity of legislators under constitutional government from civil liability arising from the performance of their duties. The basis of the immunity was to preserve the object that legislators should be answerable only to the people. This immunity from civil liability was recognized and approved by the Supreme Court of the United States in the case of *Kilbourn v. Thompson,* 103 U.S. 168, long after the adoption of the Bill of Rights. That immunity has continued to cloak the Congress of the United States. The immunity expressed in the Constitution merely declares a right which the Congress already had. As pointed out in *Kilbourn v. Thompson,* which will be hereafter discussed, the legislature of a State had a like immunity.

Later in our history, the Fourteenth Amendment was adopted. On its face there is not the slightest indication that it intended to impair or affect the right in the people to have their legislative repre-

sentative responsible to others than to them. At the time of the adoption of the Fourteenth Amendment there did not exist any body of law which held that a Congressman or Legislator was subject to civil liability for acts done in the discharge of his duty. The law appears to be to the contrary. Thus, the people, governed under the form of government which they established, possess fundamental rights which are in whole or in part described in the Constitution. Three of these rights are, freedom of speech, the right to petition their government for the redress of grievances, and the right to elect legislators answerable to them alone.

The relative importance of these respective rights will vary depending upon the individual who considers them. The fact is, however, that for one hundred and fifty years we have done well in the operation of our governments where the claim of civil liability of legislators for acts performed pursuant to their power and under their duty has not been sustained. How well we will do if the acts of legislators in the performance of these duties are to subject them to civil liability we trust we will never have to consider. Even the person who petitions the legislature for redress of grievances is entitled to have his grievances heard by a legislature answerable only to the people and immune from being held accountable in Court for its actions in discharge of its duty.

We see no distinction between a state legislator and a federal congressman. We see no distinction between

a claim of civil liability against a State Un-American Activities Committee and the Un-American Activities Committee of the House of Representatives.

If the adoption of the first ten amendments did not repeal by implication the immunity from civil liability of congressmen, it is difficult to see how it would be possible to have an implied repeal of civil liability of state legislators flow from Section 1 of the Fourteenth Amendment.

On this interesting subject the language of Justice Field in *Ex parte Virginia*, 100 U.S. 339, 362, is enlightening:

> "To every State, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial, and executive authority. Congress could not undertake to prescribe the duties of a State legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the State."

The language on page 203 of *Kilbourn v. Thompson*, supra, referring to the privilege of civil immunity, is applicable:

> " 'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the

rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.'

* * * * * * *

"Mr. Justice Story (sec. 866 of his Commentaries on the Constitution) says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right.' "

Additional cases on this subject are:

Collins v. Riley, 24 Cal. (2d) 912, 915;
Ex parte McCarthy, 29 Cal. 395;
Hearst v. Black, 87 F. (2d) 68;
United States v. Bryan, 72 F. Supp. 58;
Cochran v. Couzens, 42 F. (2d) 783;
Spalding v. Vilas, 161 U.S. 483.

Let us face the issue squarely. The Congress of the United States and the Legislators of the States are now and for some time past have been concerned with subversive elements and militant minorities. It is for the Court to say here whether under our form of government it is the intention of the people, in whom all rights are reserved, that their legislators shall perform their public duty in an atmosphere of apprehension, which would necessarily result if the claimed aggrieved can sustain an action such as this under the Civil Rights Act. This is a matter of great concern

to the legislature of the State of California. No issue presented in this case overshadows the right of the people to elect and have act for them legislators who are answerable only to them.

It is wrong from the viewpoint of the people that a legislator be influenced in his duty by money given to him (bribery); it is equally wrong that a legislator should be influenced by the fear that money should be taken away from him.

It is interesting to note that this Court considered it very doubtful whether action taken under the constitution of a state is actionable under the precise language of Section 43, Title 8, U.S.C.A. (See *Giles v. Harris*, 189 U.S. 475.)

Consistent with the above reasoning and pointing to the fact of the importance of the subject, we refer to the Court for attention the language of Judge Rutledge in *Screws v. United States*, 325 U.S. 91, at 127:

> "More rarely they have touched other matters, such as the limiting effect of official privilege and, in occasional instances, mens rea."

In support of this observation reference is made to *United States v. Chaplin*, 54 F. Supp. 926, a lengthy opinion relating to the exemption of Courts in discharging their judicial duties. The distinction appears to be that if the judge or legislator is acting in the performance of his official duty as judge or legislator, he has an immunity. We are not pressing the proposition that a judge or a legislator acting beyond the power conferred in him has immunity from civil

liability. So in this case, where it appears on the record that the legislators were acting within their power as legislators, the mere allegation that they acted with malice or intent to deprive a person of a civil right does not bring the basic cause of action within Section 43, Title 8, U.S.C.A. Cf. *Bottone v. Lindsley,* 170 F. (2d) 705.

Here, all of the acts done were pursuant to the Constitution of the State of California, the legislative enactment of the resolution appended to the complaint, and the provisions of the Government Code of California and the Penal Code of California. Does the mere allegation of malice or intent to deprive a person of a constitutional right in an action that is clearly within the provisions of due process in the state take it without the rule of exemption of immunity from civil liability?

C.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT WHEN ACTING WITHIN THE SCOPE OF THEIR LEGISLATIVE POWERS.

The Circuit Court, in its opinion, properly declares that the acts of the petitioners as members of the Committee in conducting the committee hearing were lawful. The Court of Appeals declares that the respondent was not deprived of the right which that Court characterizes as the right of freedom of speech. We in turn disagree with that Court in characterizing the right as freedom of speech but earnestly urge

that it was petitioning the legislature for redress of grievances. Regardless of whether the right was freedom of speech or petitioning the Legislature for redress of grievances, the Court of Appeals spells out a claim for relief for the respondent on the basis that although all of the acts were legal and conformed with the constitutional laws of the State of California, that if they were performed with malice and intent to punish and oppress respondent for having exercised his right, a claim for relief is stated.

The Court of Appeals has held, and even if it did not so hold, it still would be apparent from the complaint, that the acts of the petitioners were in performance of their duties and pursuant to the powers within them vested by the State of California by resolution passed by the State Legislature and statutory laws of the State. The decision announced by the Court of Appeals is that the petitioners are subject to a cause of action for damages. Thus a trial Court must determine whether petitioners had in their actions otherwise lawful, a motive to punish the respondent for having exercised his right of free speech or, as contended by petitioners here, the right to petition the Legislature. This decision was reached without the discussion or mention of the basic principle that the Legislature is free from interference by the judiciary. It is respectfully submitted that there can be no claim for relief under the Civil Rights Act which depends upon the existence of motive or intent in the minds of the legislators at the time they performed a legislative act within their power. This

is not a subject into which Courts may inquire. This precise question has been before the Courts of the United States in recent years on numerous occasions. It is true that the cases did not involve the application of the Civil Rights Act. However, the cases did involve the constitutionality of the action of Congressional Committees under attack upon the ground that their action infringed upon the right of individuals secured by the First Amendment to the Constitution. It must be borne in mind that the First Amendment to the Constitution is a clear and unequivocal declaration that Congress shall make no law violating any right included in the present case.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Act. Thus, the power of the Court to inquire into the motives of the legislative committee is no greater than the power of the Court to inquire into the motives of the Committee created by Congress.

In *Dennis v. United States*, 171 F. (2d) 986, 988, the Court stated:

> "Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either

the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

In the case of *Eisler v. United States*, 170 F. (2d) 273, 278, the Court stated:

"During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees."

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia, and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States*, 167 F. (2d) 241, 250, in which case the Court stated:

"Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Emi-

nent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States*, citing *Hearst v. Black*. The remedy for unseemly conduct, if any, by Committees of Congress is for Congress or for the people; it is political and not judicial.

"It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive."

In the *Townsend* case cited by the Court (*Townsend v. United States*, 95 F. (2d) 352, 361), the Court stated:

"Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The

orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* Hearst v. Black, 66 App. D. C. 313, 87 F. 2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute. Sinclair v. United States, supra, 279 U. S. 263, at page 299, 49 S. Ct. 268, 273, 73 L. Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. McGrain v. Daugherty, supra, 273 U. S. 135, at pages 175, 176, 47 S. Ct. 319, 329, 71 L. Ed. 580, 50 A. L. R. 1. He cannot be heard to plead justification and, hence, lack of willfulness in defiantly leaving a hearing because he does not like the questions propounded to him —remedy by objection and refusal to answer both being open to him." (Italics added.)

In the case of *Hearst v. Black* (also cited by the Court in the *Barsky* case), 87 F. (2d) 68 at pages 71 and 72, the Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents

could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.*

The Constitution has lodged the legislative power exclusively in the Congress. If a Court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.'* Springer v. Philippine Islands, 277 U. S. 189, 201, 48 S. Ct. 480, 482, 72 L. Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. City and County of San Francisco,* 32 Fed. 503, 506 (Circuit Court, Northern District, California, 1887) in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may

tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works v. New Orleans,* 164 U.S. 471, 481, in which it was stated in an opinion by Justice Harlan:

> "If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the State and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption." (Italics added.)

The Court in the *Barsky* case, supra, also relied upon the historical case of *McGrain v. Daugherty,* 273 U.S. 135.

In the latter case, at page 175, the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee af-

fords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or the writ of habeas corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon*, 243 U.S. 521, 545, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Con-

gress to punish for a contempt for an obstruction of the exercise of the legislative power:

> "And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

The decisions cited and quoted above are founded upon and are applications of the rule prevailing with respect to the legislative enactments, for it has been held without exception that the judiciary cannot inquire into the motives of the legislature in the enactment of legislation.

14 *Am. Jur.* 399;
11 *Am. Jur.* 818;
1 *Cooley's Constitutional Limitations,* 8th Ed. 379.

The following language from the opinion of Chief Justice White in *McCray v. United States,* 195 U.S. 27, 54, is quoted with approval by Cooley, note, page 381:

> "It is * * * argued, if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the govern-

ment may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * *

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The Supreme Court of the United States has not distinguished between Congress and the legislative bodies of the respective states of the Union in refusing to consider the wisdom, need and appropriate-

ness of legislation or the motives of the legislature in the passage of laws.

Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. Watertown, 130 U.S. 301;
Soon Hing v. Crowley, 113 U.S. 703;
New Orleans v. Warner, 175 U.S. 120;
Sonzinsky v. United States, 300 U.S. 506;
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381;
Mulford v. Smith, 307 U.S. 38.

The Court of Appeals for the Ninth Circuit has also followed this general rule in the case of *Allen v. Markham*, 156 F. (2d) 653, 660.

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into the motives of the legislative departments of the Federal or of the State governments. The power of the Court in this case can be no greater than the power of the Court to inquire into the motives of Congressional Committees. The only justification for such inquiry would be the application of the provisions of the First and Fifth Amendments to the Constitution of the United States directly. The Fourteenth Amendment and Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State. It is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

The *Eisler* case and the *Barsky* case hold flatly that the judicial power may not be used to scrutinize the motives of the committee upon an attack almost identical with the one made here.

The Court of Appeals here has held that the action of a legislative committee, making legitimate use of the power conferred upon it, may become unlawful by scrutinizing and inquiring into the motive actuating the committee in the performance of its acts.

Thus the holding here is in direct conflict with the holding in the cases cited.

The purpose of the investigation of un-American activities of necessity involves freedom of the press, freedom of speech, freedom of assembly. When the speech and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating may, under the decision of the Court of Appeals in this case, face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble and that the act was actuated by malice. The holding of the Court of Appeals that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself), may be scrutinized by the judicial branch of the government is not within the power of a Court under a republican form of government, with separation of powers. It has been

consistently held that the exercise of constitutional rights by individuals is subject to, and limited by, the right of the people to have the government function.

Incidental to this subject, the holding of the Court of Appeals above discussed completely ignores the fundamental rule in civil law, namely, that well-expressed rule in the following quotation from 54 *C.J.S.* 915:

> "Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful."

It is to be borne in mind that numerous decisions including very recent decisions of your Court have determined the constitutionality of regulations and ordinances passed in various States but your Court has never permitted the test to be the claimed intention of the lawmaking body in adopting the law or regulation. The question has always been whether the regulation or ordinance does or does not deprive a person of a constitutional right. Are we going to interject into every piece of legislation hereafter to be reviewed in this Court coming from state jurisdictions an inquiry into the intent which prompts the enactment of the ordinance otherwise legal? Let us illustrate this proposition further: Assume that X, a person or group of persons of means, engages in a campaign bottomed on vilification of a group of candidates to the legislature. Such an attack may be car-

ried on pursuant to the rights vested in a person to freely speak his mind. The legislators attacked are elected and enact a measure deemed by X inimical to his interests. Can X sue the legislators on the ground that the bill was passed with the intent and motive of the legislators involved to punish X for having exercised his constitutional right?

The principle involved in this subdivision of our brief and also in our treatment of the subject of immunity of state legislators from civil liability is splendidly expressed in connection with the judiciary by Crompton, J., in the case of *Fray v. Blackburn*, 3 Best & Smith (Q.B.) 576, 577, as follows:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. Therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

The above language was quoted with approval in *United States, etc. v. Bell, et al.*, 135 Fed. 336.

The Circuit Court affirmed the principle involved in the case of *Lyons v. Baker, et al.*, 180 F. (2d) 893, an action under the Civil Rights Act. Certiorari denied in the Supreme Court October 9, 1950.

See also, *Bradley v. Fisher*, 80 U.S. 335.

D.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS IMPROPERLY APPLIED THE DOCTRINE OF REPRISAL.

1. Actions claimed to constitute reprisal for having exercised a constitutional right are not actionable under Section 43, Title 8, U.S.C.A.

It is to be observed that we are here concerned not only with the consideration of constitutional rights but also with the construction of a statute.

In 1871 the Congress of the United States passed Section 43, Title 8, U.S.C.A. and at the same session and as part of the statute, passed Section 47, Title 8, U.S.C.A. Both sections are from the Act of April 20, 1871, Chapter 22; Section 43 is subdivision 1 thereof and Section 47 is subdivision 2 thereof. It is to be observed that at the time of passage of Section 43, which gives a cause of action for the deprivation of the rights thereunder secured, there was very clearly in the mind of Congress the subject of a cause of action for reprisal or punishment for having exercised a right secured.

Section 47(1) Title 8 U.S.C.A. shows the presence of the thought in these words:

> "If two or more persons in any state * * * conspire * * * to injure him (any person holding any office, trust or place of confidence under the United States) in his person or property on account of his lawful discharge of the duties of his office * * *"

Section 47(2) Title 8 U.S.C.A. provides:

> "If two or more persons in any state * * * conspire to deter, by force, intimidation or threat,

cont'd on p 57 after p 59-60 INFRA

was deemed to be a federally protected right, action was taken by the defendant which deprived the person of property, namely, the right to hold a public position. Intentionally inflicting loss of employment is punishment. *U. S. v. Lovett*, 328 U.S. 303, at 315.

The Court of Appeals has decided, in effect, that punishment for the exercise of a constitutional right is the equivalent of deprivation of the right. We have heretofore discussed the unsoundness of this interpretation of Section 43. Apart from our claim that the Court of Appeals interpreted Section 43 erroneously, we urge that the facts pleaded and existent clearly disclose that there was no reprisal or punishment inflicted for the exercise of a constitutional right.

Here, the right involved related to circulating a petition among the legislators of the State of California regardless of whether it is regarded as an act of petitioning the legislature for redress of grievances or the exercise of freedom of speech. The next series of acts are all set out in the complaint, and have been referred to from time to time herein fully, and none has the direct effect of punishing nor even the tendency to punish. It will be observed that in *Bomar v. Keyes*, supra, the Court refers to the case of *Douglas v. City of Jeannette*. In that case the Supreme Court of the United States did remit the man to defend his position in the state Court on the assumption that the state Court would properly apply existing laws and that he was protected to the extent that there was no need for a federal Court to issue an injunction to stay

the hand of the state Court. It would be very difficult, and to us, impossible, to find that the act of serving a subpoena lawfully issued under the laws of a state to appear at a hearing could possibly be determined reprisal or punishment. The body holding the hearing did not have the power by judgment or edict nor did it attempt to deprive the respondent of his property or of his liberty.

It must not be overlooked that once the hearing in the Legislative Committee started, the respondent chose under legal advice to be in contempt of the Legislative Committee. No action was taken against him other than to set in motion the orderly processes under the statutory law of California to have determined whether he had committed a misdemeanor by refusing to answer questions. This procedure was initiated by the committee. The full scope of the inquiry initiated permitted a full defense on the part of respondent on the law and on the merits. Wherein does reprisal or punishment flow from these facts?

The action of the committee on the one hand and the respondent on the other, after he was subpoenaed to appear before the committee, became and was a controversy between a citizen of the State of California and an arm of the State Legislature. The Court in its recent case, *Douglas v. City of Jeannette*, supra, declares:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by

> * * * to injure such party or witness in his person or property on account of his having so attended or testified * * * or to injure him or his property for lawfully enforcing or attempting to enforce the right of any person or class of persons * * *"

Section 47(3) Title 8 U.S.C.A. provides:

> "If two or more persons * * * conspire * * * to injure any citizen in person or property on account of such citizen's advocacy * * *"

How simple it would have been for Congress, if it so intended, to have added to Section 43 the words "or to injure any citizen of the United States in his person or property on account of having exercised his rights, privileges or immunities secured by the Constitution". No such language appears in Section 43. Eighty-nine years later a Court of Appeals of the United States reads this language into Section 43. Not only does the decision of the Court of Appeals in this case add a clause to Section 43 which was rejected by the Congress which passed it, but the Court has created an additional class of persons who may be subject to civil liability under the section. The decision of the Court of Appeals in this case is predicated upon the decision in the Second Circuit, *Bomar v. Keyes*, 162 F. (2d) 136. It is interesting to observe that in *Bomar v. Keyes*, supra, the Court of Appeals used the following language:

> "True, the plaintiff did serve upon the jury—literally, she was not 'prevented' from doing so—but it would emasculate the act either to deny

protection against reprisal to those whom threats did not deter, *or to leave without recourse those who were later made the victims of reprisals of which they had not been warned.* Indeed, this is the inevitable implication of Douglas v. Jeannette, in which those aggrieved by prospective prosecution for the exercise of their constitutional privileges, were remitted to their defence, if an attempt should be made to punish them." (Italics added.)

The case cited by the Second Circuit above is *Douglas v. City of Jeannette,* 319 U.S. 157. In that case the Supreme Court did remit the man to defend his position in the state Court on the assumption that the state Court would properly apply existing laws and that he was protected to the extent that there was no need for a Federal Court to issue an injunction to stay the hand of the state Court.

The points raised here were not discussed in *Bomar v. Keyes,* supra, nor by the Court of Appeals for the Ninth Circuit.

2. The acts complained of in the complaint at bar do not constitute reprisal or punishment.

Apart from the legal question of whether there should be read into Section 43 matters omitted therefrom considered by the Congress at the same time and inserted in Section 47, we have here the question of whether reprisal or punishment is pleaded or disclosed in the record. It is to be observed that in *Bomar v. Keyes,* supra, after the exercise of what

cf p 59 supra

federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved."

Once the committee lawfully assembled to discharge its duty under the resolution creating it, the criticized action of one of its members could not and did not cause the committee to lose its jurisdiction. It would be as though a claim were made that a judge had no jurisdiction to try a person merely because he committed an act of misconduct during the trial.

CONCLUSION.

It is submitted that the decision of the Court of Appeals in this case should not be permitted to stand. Its interpretation of the Civil Rights Act foreshadows the destruction of the legislative processes of the States. It places out of balance the power of the legislature and judiciary by permitting the judiciary to sit in judgment on the motives of legislators in the performance of their duty. It sets at naught the right of the people to have its elected legislators answerable only to them.

The complaint does not state a claim for relief, and we submit that the decision of the District Court should be affirmed.

Dated, San Francisco, California,
February 2, 1951.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (A California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

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BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I. PRELIMINARY STATEMENT

This brief is filed on behalf of several of the States of the United States, by their chief law officers, because of the serious implications of the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case (*Brand-*

howe v. *Tenney*, 183 F. 2d 121) when considered in conjunction with the decision of the Circuit Court of Appeals for the Second Circuit in *Picking* v. *Pennsylvania R. Co.* (1945), 151 F. 2d 240; (certiorari denied 332 U.S. 776; rehearing denied 332 U.S. 82[illegible]). These decisions, in the opinion of *amici curiae*, pose a formidable threat to the sovereignty of the States and the functioning of their governmental agencies. They are based upon a construction of the Federal Civil Rights Act which goes far beyond any intent expressed by the framers of that legislation and which so far invades the reserved powers of the States that (assuming the existence of the power to do so) it is highly unlikely that Congress ever intended that these acts should be so applied. It is not too late for this Court to examine fully the whole problem; and it is the purpose of this brief to clarify the issues so that the matters which are basic to the States will be carefully examined by the Court.

Amici curiae are not interested in the local concerns which gave rise to the litigation in the present case. Neither are they prepared to express an opinion as to the desirability of State legislative committees created to study the subject of un-American activities, or as to the rules of procedure which such committees should follow in carrying out the responsibilities assigned to them in that field. They are concerned, however, about the promulgation of a rule of law which would impose a personal liability in damages upon members of a State Legislature (or other State officers, for that matter) which is based upon a standard of liability dependent upon the broad generalities of the 14th Amendment to the United States Constitution, as that Amendment is construed by the courts from time to time.

II. SCOPE OF THIS BRIEF

The Circuit Court of Appeals in this case reversed the trial judge's dismissal of the action as to defendants herein upon the ground that a cause of action is stated under Section 43, Title 8, U.S.C.A., (17 Stats., 13; R. S. sec. 1979) which reads:

> "Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

We assume for the purpose of this brief that this eliminates, before this Court, any need for discussing Section 47(3) of said Title (R. S. Sec. 1980; 12 Stat. 284; 17 Stat. 13), and we will confine our discussion to the above statute and to the principle which the Circuit Court of Appeals laid down as the law of the case, i.e. "that [issue] pertaining to the consequences of an unwarranted interference, if any there was, with the right of freedom of speech."[1]

This limitation on the scope of our brief is not meant to indicate that we are unconcerned with the other issues presented by the case. In this regard, we are prepared to support the position taken by defendants in their brief. We

[1] 183 F. 2d 121. Sec. 47(3) of Title 8, U.S.C., relates specifically, and exclusively to causes of action based upon discrimination and denial of equal protection of the laws (*McShane* v. *Moldovan*, (CCA 1949) 172 F. 2d 101; *Bottone* v. *Lindsley*, (CCA 1948) 170 F. 2d 705, cert. den. 336 U.S. 949, 69 S. Ct. 810, 93 L. Ed. 1101). In this connection *amici curiae* support the position taken in defendants' brief before this Court, that is, that nowhere in the allegations of the complaint can be found the charge of purposeful discrimination between the plaintiff and others similarly situated which could give rise to a cause of action based upon a denial of equal protection of the laws.

agree with them that the Federal Civil Rights Acts were never intended to be used as a vehicle for inquiring into the motives of state legislators, or for breaking down the traditional doctrine of legislative immunity from private damage actions.

As is forcefully pointed out by defendants in their brief before this Court, we think that the right to petition a State Legislature is not a right guaranteed by the United States Constitution. Like defendants we find no allegations in this complaint which would bring into play the privileges and immunities clause of the 14th Amendment (see *Slaughterhouse Cases* (1873), 16 Wall. 36, 21 L. Ed. 394; *Adamson* v. *California* (1946), 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903) or the equal protection clause of that Amendment. (See, *Snowden* v. *Hughes* (1943), 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497) Furthermore, as will appear more fully hereafter, the basic premise relied upon in this brief is that the due process clause of the 14th Amendment furnishes too uncertain a standard (in the absence of judicious limitation) to constitute a basis for civil liability in damages against State officers. The same premise applies to the privileges and immunities clause and the equal protection clause as was pointed out by Justice Douglas in the case which we believe furnishes a pattern upon which the instant case must be decided:

> "Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause [citing cases] and the equal protection clause [citing cases] of the Fourteenth Amendment are involved." (*Screws v. United States* (1945), 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330.)

We propose, therefore, to devote our effort in this brief to a consideration of the "due process" clause of the 14th Amendment, and the extent to which a civil cause of action in damages against a state legislator is created under that clause by use of the phrase "rights . . . secured by the Constitution and laws" in Section 43 of Title 8, U.S.C.

The precise question we desire to place before this Court, and the crucial issue presented by the instant case is this:

> IN A CASE SUCH AS THE ONE ALLEGED, WHERE THE "TREACHEROUS GROUND"[2] OF THE DUE PROCESS CLAUSE IS INVOLVED, CAN A CAUSE OF ACTION FOR CIVIL DAMAGES BE STATED AGAINST STATE LEGISLATORS UNDER THE FEDERAL CIVIL RIGHTS ACT (Sec. 43 of Title 8, U.S.C.) UPON ALLEGATIONS THAT, IN THEIR CONDUCT OF AN OFFICIAL LEGISLATIVE PROCEEDING NOT OTHERWISE UNLAWFUL, THEY HAVE IMPROPERLY INTERFERED WITH FIRST AMENDMENT GUARANTEES OF FREE SPEECH, MADE APPLICABLE TO THEIR STATES AND TO THEMSELVES BY THE (SUBSTANTIVE) DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT.

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[2] Douglas, J. writing the majority opinion in the *Screws* case, 325 U.S. 97: "The treacherous grounds on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. [Giving examples] . . . these are illustrative of the kind of state action which might or might not be caught in the broad reaches of Sec. 20 [the Federal Civil Rights Act] dependent on the prevailing view of the Court as constituted when the case arose."

III. NATURE OF THE CIVIL CAUSE OF ACTION UNDER SECTION 43.

A. Relationship between the civil and criminal causes of action under the Federal Civil Rights Act.

The background underlying this legislation has been fully explored in recent decisions of this Court.[3] Thus, it has been pointed out that the legislation was based upon Section 5 of the 14th Amendment, giving Congress the right to implement the guarantees of that provision, and that the civil and criminal provisions are traceable to the same basic legislation. (See *Screws* case, *supra*, and particularly the legislative history traced in 325 U.S. 98.) The courts have consistently construed the civil and criminal portions of the statute to be *in pari materia*. (See *McShane* v. *Moldovan*, (CCA 1949), 172 F. 2d 1016) Both the civil and criminal causes of action were used in limited numbers of cases prior to 1940, and for the most part such cases were involved with specific statutory or constitutional prohibitions involving federal elections and discrimination against individuals upon grounds of race or color.[4] These, of course, were the great issues out of which grew the formulation of the 13th, 14th and 15th Amendments, and the Civil Rights Acts. Not until 1945, however, were the criminal provisions of the statute applied by this court to the "vast, undisclosed range of the Fourteenth Amendment."[5] The Court saved the constitutionality of the

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3 *Screws* v. *United States* (1945), 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; *United States* v. *Classic* (1940), 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368.

4 See the list of cases compiled in "Liability of Public Officers to Suit under the Civil Rights Acts," (1946) 46 Columbia Law Review 614; and cases collected in annotation (1946) 162 A.L.R. 1373-1401.

5 "The Government recognizes that 'this is the first case brought before this Court in which Section 20 has been applied to deprivations of rights secured by the Fourteenth Amendment.'" *Screws* v. *U.S.*, *supra*, 325 U.S. 157.

criminal statute in the *Screws* case by recognizing that a *limited criminal cause of action* could be said to exist under the statute, thus preserving the criminal sanction for any violations of the due process clause which had become sufficiently specific, either by legislation or by prior decisions of the Court. The question of when a due process prohibition can be said to have become sufficiently specific to meet the test of constitutionality cannot be decided by any pre-determined test. Certainly in that case, where law enforcement officers brutally beat a colored prisoner to death, it was not hard to reach the conclusion that a clear and intentional deprivation of known due process rights was involved. The conceded uncertainties inhering in the Fourteenth Amendment and the requirement for "pricking out" the line in a case-by-case series was clearly recognized by both the majority and the minority of the Court. Even in that aggravated situation, three members of the Court did not find the requisite certainty. The majority, however, sustained the statute as a criminal prohibition *by ruling out the areas of uncertainty*, and by limiting the criminal cause of action *to the areas of certainty*.

For the first time, this Court is now faced with applying the broad reaches of the Fourteenth Amendment to a civil liability in damages created against State officers by the Federal Civil Rights Act. It is our position that this issue, presented herein for the first time, must be solved along the lines which were carved out when the criminal cause of action on the due process clause was first before this Court in 1945.

The civil cause of action, based on Section 43 of Title 8, U.S.C., with the exception of the word "wilful," contains *the same* language which the Court was considering in the *Screws* case (*supra*). The phrase which was the subject of the attack was "any rights, privileges or immunities secured [or protected] by the Constitution and laws." Except for the phrase enclosed in brackets the language of Section 43 is identical. The decision of the Court declares that if this language embraces "those broad and fluid definitions of due process" it contains *no* standard by which any person can guide his conduct. As expressed by the Court:

> "To enforce such a statute would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand and posted up in a corner, so that no one could make a copy of it." (325 U.S. 96)

The Court, after citing cases to illustrate its remark, went on to state, in effect, that if the statute were so interpreted:

> "Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea." (325 U.S. 97)

These words, which are equally applicable to the statute here involved, understate the danger to state officials by confining themselves to law enforcement officials. The *Picking* case (*supra*) and this case indicate that the legislative and judicial branches of State governments are faced with the same impossible choice unless this Court clarifies the situation.

B. Prior Judicial Application of the Screws Case to the Civil Cause of Action; the Picking Case.

The issue now raised before this Court was considered in *Picking* v. *Penna. R. Co., supra,* (cert. den. 332 U.S. 776. No. 6.)[6] After considering the action of this Court in the *Screws* case, the Circuit Court of Appeals indicated that the civil cause of action under Section 43 does not have to be limited in its scope as the criminal cause of action was limited. The Circuit Court observed (151 F. 2d at 249):

"The Screws decision held Section 20 of the Criminal Code constitutional because it contained the word willfully and indicated that if that word had not been inserted by the revisers the statute would not meet the test of the Fifth Amendment, citing *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045. But R. S. Sec. 1979 [Section 43 of Title 8, U.S.C.] *which creates a civil liability* for a tortious act cannot be held to be too vague to meet the test of the Fifth Amendment because it does not refer to the state of mind of the tort-feasor." (Italics added).[7]

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6 Denial of certiorari, we assume, does not indicate any approval by this Court of the views expressed by the Circuit Court of Appeals. (See *Maryland* v. *Baltimore Radio Show* (1949), 338 U.S. 912, 70 S. Ct. 340, 94 L. Ed. 252.

7 In support of this proposition the case of *Hague* v. *C.I.O.* (1938), 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 is cited. Neither the constitutionality nor the permissible scope of the statute was before this Court in that case. The Court carefully stated (307 U.S. 506, 507):

> "By their specifications of error the petitioners limit the issues in this court to three matters. They contend that the court below erred in holding that the District Court had jurisdiction over all or some of the causes of action stated in the bill. Secondly, they assert that the Court erred in holding that the street meeting ordinance is unconstitutional on its face, and that it has been unconstitutionally administered. Thirdly, they claim that the decree must be set aside because it [i.e., *the decree*] exceeds the court's power and is impractical of enforcement or compliance."
> (Matter in brackets added).

In addition, the case involved an injunction. Federal courts have frequently enjoined state action, and it is doubtful whether any precedent is created thereby which would apply to a cause of action for damages against state officers. See (1946) 46 Columbia Law Review 614, 619.

This language fails to give full effect to the principal opinion in the *Screws* case (*supra*). As we have pointed out, that opinion flatly stated that, without the restrictions imposed by the Court, those subject to the prohibitions of the due process clause under the statute could neither know nor find out (until after they had acted) whether their action made them liable to criminal penalties. The opinions of the Court recognize that such a statute would deprive those affected of due process of law.

The burden of complying with unknowable standards of conduct is not less unjust if it imposes an obligation to pay $250,000 damages than it is if it results in a conviction and fine of $1,000. To distinguish between the statutes on the theory that one imposes criminal sanctions while the other imposes civil sanctions is to beg the constitutional question involved. In *Small (A. B.) Company* v. *American Sugar Ref. Co.* (1924), 267 U.S. 233, 45 S. Ct. 295, 69 L. Ed. 589, this court made the following statement concerning *United States* v. *L. Cohen Grocery Co.* (1920), 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045, mentioned in the language of the *Picking* case last quoted above:

> "In a series of cases of which *United States* v. *L. Cohen Grocery Co.* 255 U.S. 81, 65 L. Ed. 516, 14 A.L.R. 1045, 41 Sup. Ct. Rep. 298, and *Weeds* v. *United States*, 255 U.S. 109, 65 L. Ed. 537, 41 Sup. Ct. Rep. 306, are examples, this court held that provision invalid as contravening the due process of law clause of the 5th Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was . . .

"The defendant attempts to distinguish those cases [i.e., the Cohen Grocery case and the Weeds case] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. *It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as to really be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.*" (Emphasis added.)

And in *Cline v. Frink Dairy Co.* (1926), 274 U.S. 445, 47 S. Ct. 681, 71 Law Ed. 1146, the Court declared that:

"The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well as in civil as in criminal legislation . . ."

The language used by seven members of the Court in the *Screws* case (*supra*) establishes the following principle beyond any room for doubt: That is, unless the statute here involved is restricted as was the criminal cause of action based upon its counterpart, this statute would require obedience to a rule or standard so vague as to be no standard at all, i.e., "an unknowable something."[8] This would violate the due process clause of the Fifth Amendment under the cases cited above, and the courts would have no

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[8] Language used Douglas, J., in *Screws* case, *supra*, 325 U.S. p. 105. Cf., Roberts, J., at 325 U.S. p. 157:

"There is no difficulty in passing effective legislation for the protection of civil rights against improper state action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment even for the judges of the highest Court in the land."

hesitation in striking down any such statute passed by Congress. This Court cannot do less when dealing with prohibitions of individual conduct based upon its construction of the due process clause of the Fourteenth Amendment.

IV. APPLICATION OF THE CIVIL CAUSE OF ACTION UNDER SECTION 43, PROPERLY CONSTRUED, TO THIS CASE.

A. Basis of Limitation Laid Down in Screws Case.

We have previously demonstrated the conviction of seven members of the court in the *Screws* case (*supra*) that the statute there involved would be void if it made criminal all conduct which might violate the due process clause of the Fourteenth Amendment. Without specifically defining such conduct, it would exact obedience to a rule or standard so vague as to be no standard at all and it would, for that reason, violate the due process clause of the Fifth Amendment.

Recognizing its duty to construe the statute in such a manner as to uphold its constitutionality, the court imposed *limitations on the cause of action* (as distinguished from its concept of the broad coverage of the Fourteenth Amendment)—limitations which would enable all persons affected by the statute to know what conduct must be avoided. *Nothing less would save the statute.* The court did this by requiring an unusually specific intention to deprive someone of a clearly-recognized constitutional right.[9] The court said (325 U.S. 103:

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[9] The court, in limiting the criminal cause of action, relied heavily on the presence of the word "wilfully" in the statute. It is clear, however, that to avoid unconstitutionality for vagueness the same limitations on the cause of action would have been required in the absence of that word. This was recognized by the judges who sustained the statute as an adequate definition of a criminal cause of action. See, Douglas, J., in the *Screws* case, 325 U.S. p. 103; Rutledge, J., 325 U.S. p. 120.

"We repeat that the presence of a bad purpose or evil intent may not be sufficient. We do say that a requirement of a specific intent to deprive a person *of a federal right made definite by decision or other rule of law* saves the Act from any charge of unconstitutionaliy on the grounds of vagueness."

And Again the court declared (325 U.S. p. 105):

"For the specific intent required by the Act is an intent to deprive a person of a right *which has been made specific* either by the *express terms* of the Constitution or laws of the United States *or by decisions interpreting them.* Take the case of a local officer who persists in enforcing a type of ordinance *which the Court has held invalid* as violative of the guarantees of free speech or freedom of worship. Or a local officer continues to select juries *in a manner which flies in the teeth of decisions of the Court.* If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute. He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. *He who defies a decision interpreting the Constitution knows precisely what he is doing.*" [10]

Whether the officer in the illustration was defying announced rules of law, or flying in the teeth of decisions of the court would therefore depend upon how closely the ordinance which he was enforcing resembled an ordinance which had previously been denounced by the court. A decision striking down as an impairment of the right to free

[10] It is, of course, obvious that there are many ordinances aimed to meet many different supposed evils in many different ways. Some may infringe upon the right of free speech. The Fourteenth Amendment does not prohibit the states in all cases and under all circumstances from impairing this right (*American Communication Assn.* v. *Douds* (1949), 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925, rehearing denied 339 U.S. 990, 70 S. Ct. 1017, 94 L. Ed. 1391).

speech an ordinance requiring a person to secure a license before using a city park to hold a meeting and giving an official unbridled descretion in granting or denying such license, would not put the officer on notice that an ordinance requiring persons to obtain and carry an identification card before soliciting persons to become members of a labor organization, and placing no discretion in any official as to issuing such card, also violates the due process clause of the Fourteenth Amendment.

The Fourteenth Amendment does not create an absolute guarantee of freedom of speech, press or religion, or the right to assemble and petition. Rather it guarantees that no person shall be deprived of those rights except under circumstances which the court has recognized to be constitutionally justified. Thus, in the *Screws* case (*supra*) the right considered under 18 U.S.C.A. 52 was not the right to life but "the right not to be deprived of life without due process of law; the right to be tried upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws." The facts in that case permit no doubt that the conduct there involved "flies in the teeth of decisions of the court."

B. Limited Cause of Action As Applied to This Case.

To subpoena a witness to appear before a legislative committee under the circumstances alleged here, particularly when the state law affords him the right to justify his refusal to testify through a judicial proceeding[11] does not constitute a deprivation of life, liberty or property without due process of law, according to any established test. This court has

[11] An opportunity which was successfully utilized by the plaintiff in this case (Paragraph 12 of Complaint, Record at p. 9.)

never held that such conduct by a public official was a denial of due process of law.

Opportunities to lay down such a rule have not been lacking. In cases involving contempt of Congressional committees the U. S. Courts of Appeal have consistently refused to condemn the actions of such committees in the face of allegations that: the purposes of the investigation were to censor thoughts and ideas and to deprive nonconformists of their employment, that the treatment afforded the witnesses did not conform to principles of due process; and that the hearings were intended to and did deprive the witnesses of due process by creating an atmosphere of fear and danger which, in itself, constituted a censorship of ideas and restraint upon free speech and a violation of the First Amendment. This Court has consistently refused to hear cases raising such issues. (*Dennis* v. *United States*, 171 F. 2d 986, cert. granted but limited to sole question of selection of jury, 337 U.S. 954, 69 S. Ct. 1527, 93 L. Ed. 1527; *Barsky* v. *United States*, 167 F. 2d 241, cert. den. 334 U.S. 843, 92 L. Ed. 1767; *Lawson* v. *United States*, 176 F. 2d 49, cert. den. 339 U.S. 934, 70 S. Ct. 663, 94 Law Ed. 1352, reh. den. 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379; *Marshall* v. *United States*, 176 F. 2d 473, cert. den. 339 U.S. 933, 70 S. Ct. 663, 94 Law. Ed. 1352, reh. den. 339 U.S. 959, 70 S. Ct. 976, 94 L. Ed. 1369; *Josephson* v. *United States*, 165 F. 2d 82, cert. den. 333 U.S. 838, 68 S. Ct. 609, 92 L. Ed. 1122; *Townsend* v. *United States*, 95 F. 2d 352. cert. den. 303 U.S. 664, 58 S. Ct. 830, 82 L. Ed. 1121). [12]

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[12] Briefs, including briefs of amicus curiae, on file in this Court demonstrate that these questions have been raised. (See, for example, the briefs on file in *Lawson* v. *United States*, *supra*, No. 248, Oct. Term, 1949, which assert that the conduct of the Congressional committee there involved violated the First, Fourth and Fifth Amendments to the United States Constitution, and describe that conduct in some detail.)

Until such time as this Court gives weight to such objections by declaring that conduct of Congressional committees similar to that present in the *Lawson* case, *supra*,[13] violate either procedural or substantive due process of law, it cannot be said that similar conduct of State Legislative Committees violates "a federal right made definite by decision or other rule of law" or that such conduct "flies in the teeth of decisions of the Court."

If Section 43 is constitutional it is subject to the same restrictive interpretation which was placed on its criminal counterpart in the *Screws* case. As has been indicated, there is no standard of conduct for state legislators which can be derived from this Court's prior decisions interpreting the due process clause of the Fourteenth Amendment which provided a warning to the legislative committee involved in this case that its conduct might impose a civil liability in damages on its members. In the absence of such a warning that their conduct created a possible liability in damages, it is clear that a kind of "liability without fault" would be involved.[14]

Construed in accordance with the principles set forth in this brief, and in accordance with the doctrines announced in the *Screws* case, it is clear that no cause of action has been stated or can be stated in this case under

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[13] Descriptions of and comment upon the conduct of that Committee and other committees are contained in the petition for certiorari in the *Lawson* case No. 248, Oct. Term 1949; in the briefs of amicus curiae filed in connection therewith; in the New York Times November 26, 1947, 1:2; in 83 Cong. Rec. 7567-86, 86 Cong. Rec. 572-605; Dimock, Congressional Investigating Committees, 162.

[14] The creation of liability without fault is such an extraordinary step that the Court ought to avoid any such interpretation in the absence of a clear indication of legislative intent to do so. The potential liability under discussion is unique, also, in view of the attitude taken historically in connection with the liability in damages of public officials. That too is such an unusual kind of liability that a clear-cut expression of legislative intent to impose it in particular situations ought to be required. (On tort liability for public officers, see (1946) 46 Columbia Law Review 614, and materials cited therein.)

Section 43. The *Screws* case has only been applied to violent, aggravated and horrifying invasions of the fundamental duties which one human being owes to another. An examination of the cases involving criminal prosecutions against state officers under the Federal Civil Rights Acts will, we believe, demonstrate that its application has been so limited. It has been confined: (1) to cases where the conduct violates specific provisions of law (pre-*Screws* case); or (2) to cases where a fundamental right has been irrevocably destroyed by means so brutal and aggravated as to leave no room for doubt that basic and established concepts of due process, confirmed by years of tradition, have been violated. No such situation is presented under the allegations in this case.

In their carefully written dissent in the *Screws* case, Justices Roberts, Frankfurter and Jackson expressed concern that, even as limited by the majority, "this shapeless and all embracing statute can serve as a dangerous instrument of political discrimination in the hands of those so inclined."[15] Can the rough and tumble tactics which have traditionally been a part of the American political scene be equated with the flagitious conduct present in the *Screws* case? It is inconceivable that Congress, in enacting this statute, intended so to do. Is it not far more likely that this kind of problem was assumed to fall within the area of "political questions" as to which the courts have always maintained a "hands off" policy. (See, *Ohio ex.*

[15] This concern applies with even greater force, of course, to the civil cause of action here involved. The criminal statute can be applied against state officers only where responsible federal officials determine that there is a need therefore; and the majority of the Court in the *Screws* case was well aware of that practical limitation. (See *Screws* case, *supra*, 325 U.S. p. 132, 159). Where is the equivalent limitation with the civil cause of action, where the public officials of the states can be forced to defend themselves against private suits brought by any individual, responsible or irresponsible?

rel Davis v. Hildebrandt (1916), 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172.) On this point it is worth noting that the plaintiff has on several occasions classified this action as one involving political controversy. "The question . . . is whether or not they acted for the purpose of silencing a political opponent . . . " (Plaintiff's Brief in Opposition to the Petition for Certiorari, at p. 16.) "The present action is based on intentional abuse of State authority to deny a political opponent . . ." certain claimed rights. (Plaintiff's Opening Brief before the Circuit Court of Appeals, p. 8.)

For all the reasons set forth, we believe that plaintiff has not, and cannot, set forth a cause of action under Section 43 of Title 8, U.S.C., as properly construed. This Court is faced with the necessity for providing that construction, and we believe that it can only reach one conclusion in doing so, a conclusion which we have endeavored to outline in this brief.

C. Consequences of Failure to Limit the Cause of Action.

We do not intend to enumerate the many examples which might be listed to demonstrate the serious effect upon State government of the principles inherent in the *Picking* case and extended in the instant case. We desire merely to indicate the general ramifications of the problem, in the confident belief that the court will recognize that many examples could be given to illustrate it.

If, in addition to requiring State officials to avoid conduct which might be construed as a deprivation of a right embraced in the "vast uncharted sea" of the due process clause of the 14th Amendment, the statute also requires state officials to avoid conduct which may be construed as

reprisal for the exercise of such right, or conduct which may frighten a person, be he ever so timid, into failing to assert such right, [16] it is neither an overstatement nor the expression of a groundless fear to say that State Governments could not properly function.

Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid "cautious advance, step by step, and the distrust of generalities." (*Hughes* v. *Superior Court* (1949), 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985.) Could any State afford to take the next cautious step if, in so doing, it might expose the legislators who passed the statute, the state judicial officers who applied it to particular persons, and the state executive officers who enforced it to damage suits brought by every person who believes he is "punished" by the enforcement of the statute or who fails to assert his rights because of fear that the statute might be applied to him if he did so?

Dated: Raleigh, North Carolina,
February 10, 1950.

HON. HARRY MCMULLAN
Attorney General, State of North Carolina
Raleigh, North Carolina

And each Attorney General Heretofore Listed,

Amici Curiae

[16] It is apparent from a reading of the 13th paragraph of the complaint (R. p. 10) that his theory is based upon the premise that he was prevented from exercising his rights by *intimidation*. In plain English, fright induced by the Committee's actions "prevented" him from continuing to assert the rights. It is interesting to note that the complaint is devoid of any allegation that the Committee had threatened to, or intended to, repeat its actions if he continued to circulate his petition or urge that the appropriation be withheld.

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In The

Supreme Court of the United States

October Term, 1950

No. 358

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE OF UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

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In The

Supreme Court of the United States

October Term, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE OF UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Brief Amicus Curiae of State of Wisconsin

NATURE OF INTEREST OF AMICUS

We have read and concur in the able briefs submitted by petitioners herein and by the National Association of Attorneys General. The state of Wisconsin is concerned that in this action there shall not be established a precedent that will deprive its citizens of the free and untrammeled services of its legislators who conceivably may be placed in fear by the threats of vexatious litigation brought by

persons who are seeking to subvert the orderly processes of government.

We regard the principal issue herein as the issue of the proper construction of the Tenth and Fourteenth Amendments to the Constitution of the United States in light of Article IV, Section 4 of that Constitution. It is our argument that a proper construction and harmonizing of those provisions of the Constitution will show that the people in adopting the Fourteenth Amendment never intended to authorize the federal government to interfere with the internal government of states or of their officers when acting under due form of law. It is our further argument that Congress in passing the civil rights act of 1871 in turn never intended to create a cause of action against state officers and in particular state legislators who are acting in due form of law. Further, we propose to argue in any event that Brandhove because of his status as shown in his petition is not entitled to assert those privileges and immunities which are dependent upon citizenship in the United States or in the State of California.

SCOPE OF THIS BRIEF

We propose to supplement the brief of petitioners by stating herein for the convenience of the court the rules of construction which we believe applicable to the federal constitution and statutes and the authorities which establish and support those rules.

I. It Is an Established Rule for the Construction of the Constitution that Provisions Which May Appear to be Repugnant Shall be Harmonized and Reconciled and Effect Given to Both Insofar as Possible.

The Tenth Amendment preserves to the states all powers which are not expressly granted to the United States or prohibited to the states. Article IV, Section 4 of the United States Constitution, which is in effect a directive to Congress and not a provision to be enforced by the courts, insures to each of the states a republican form of government. The Fourteenth Amendment states that no state shall deprive any person of life, liberty or property without due process of law. When this amendment was passed the Tenth Amendment remained a portion of the Constitution and was in no way expressly repealed. If a construction of the Fourteenth Amendment were possible within the language of that Amendment which would render the Tenth Amendment wholly nugatory, it would appear that our controlling rules of interpretation militate strongly against such a construction.

We respectfully suggest that such a construction of the Fourteenth Amendment is not only possible but is the construction which is contended for by Brandhove in the instant action. The Fourteenth Amendment may be implemented in two ways:

1. The Congress may provide that the courts of the United States and the Supreme Court shall have review jurisdiction to reverse any decrees of any state court or agency which would purport to deprive any person of life, liberty or property in contravention of the Fourteenth Amendment.

2. The Congress might provide that not only should the action of the state agency be reversed by a federal court but that every person who participated in the action of the state agency should be liable to the sanctions of criminal punishment and civil damages in a proceeding brought before a federal court.

We respectfully suggest that this second alternative carried to its logical extreme would result in the complete negation of the Tenth Amendment and the guaranty of a republican form of government and of the destruction of all independent actions by the state. Such a construction would mean that every judge who erred in the interpretation of a provision of the federal constitution would possibly be liable to federal sanctions; every jury that participated in an erroneous verdict, every peace officer who executed an erroneous warrant or writ, every legislator who voted for an enactment later held invalid, and, as in the present case, every member of a legislative committee when engaged in an investigation later held to be improper, would be liable also to federal sanctions.

We concede that an amendment to the federal constitution could be framed and adopted which would have that effect and which would result in a repeal of the Tenth Amendment. But we respectfully suggest that under a proper interpretation of the Fourteenth Amendment such result was not intended.

The rule of construction applicable to such a case was laid down at an early date by Chief Justice Marshall in the case of *Cohens v. Virginia*, 19 U. S. 264, 6 Wheat. 264, 5 L. ed. 257, in which he stated in discussing the jurisdiction of the United States Supreme Court:

"* * * These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party, may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions *as far as it is possible to reconcile them*, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument." (Italics supplied.)

We respectfully suggest that the paralysis of all functions of state government which might result from the more liberal interpretation of the Fourteenth Amendment was never contemplated or intended by the people when that Amendment was adopted, and the fact that the Tenth Amendment was not expressly repealed must be given due weight and consideration in the determination of the extent of the powers conferred by the Fourteenth Amendment. Both provisions remain a part of our constitution and both must be construed so that one does not unnecessarily override the other.

The right to prescribe their own internal organization and government is an important right of the states. *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. ed. 1187.

The foregoing argument is reinforced by the similar proposition that the Constitution must be construed as a whole. In the recent case of *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 67 Sup. Ct. 156, 91 L. ed. 80, this court quoted with approval the statement

of Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 571, 10 L. ed. 579:

> "In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident, from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning * * *."

II. It Is Not Lightly to Be Assumed that in Adopting Any Constitutional Amendment there Was a Purpose to Depart from or Imperil a Constitutional Principle so Vital to the System of Government as the Independence of the Three Coordinate Branches thereof and in Particular of the Legislative Branch from the Judicial Branch.

Complementing the argument under paragraph I, we further respectfully suggest that an intention by a Constitutional Amendment to overturn a large and vital body of law which has been established by this court through its decided cases should not be assumed. While the end result in the case of *Evans v. Gore*, 253 U. S. 245, 64 L. ed. 887, 40 S. Ct. 550, has since been reversed the principle is well stated in that case: "That a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed."

We suggest that the same principle applies to the construction of any constitutional amendment which would unduly infringe upon the independence of the legislature, both of the states and the federal government. It must unquestionably be conceded that such independence could be destroyed, but we insist that such destruction should be accomplished by express language and not by construction of such general language as is found in the Fourteenth Amendment.

Similar considerations apply to the Acts of Congress, with the further proviso that Congress is charged with enforcing Art. IV, Sec. 4, and the presumption of official regularity requires the court to assume that Congress has done its duty, and to adopt that possible construction of Congressional Acts which is consistent with the obligation.

III. The Independence of the Legislative Branch is Established and Reinforced by Two Well Settled Rules of Law Which Have Continuously Been Applied and Recognized by this Court Both before and after the Adoption of the Fourteenth Amendment.

a. There is a field of political action in which the legislature is recognized as supreme. This field includes the right of the legislature to arrange its own internal affairs and its own rules of procedure

The rule is stated in 16 C. J. S. 431, para. 145: "Political questions do not constitute matter for determination of the judiciary."

The following are representative cases in which the rule was applied:

Indian Affairs and Treaties

The Cherokee Tobacco, 78 U. S. 616, 20 L. ed. 227;

United States v. Sandoval, 231 U. S. 28, 58 L. ed 107, 34 S. Ct. 1;

Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 S. Ct. 794.

Recognition and Status of Foreign Governments

Jones v. U. S., 137 U. S. 202, 34 L. ed 691, 11 S. Ct. 80;

Smith v. U. S., 137 U. S. 224, 34 L. ed 700, 11 S. Ct. 88;

Recaud v. American Metal Company, 246 U. S. 304, 62 L. ed 733, 38 S. Ct. 312;

U. S. v. Pink, 315 U. S. 203, 86 L. ed 796, 62 S. Ct. 552.

Definition of Legal Tender

The Legal Tender Cases, 110 U. S. 421, 28 L. ed 204, 4 S. Ct. 122.

Acquisition of Territory

U. S. v. Regner, 50 U. S. 127, 13 L. ed 74;

Dred Scott v. Sandford, 60 U. S. 393, 15 L. ed 691.

Powers Over Public Lands

U. S. v. City and County of San Francisco, 310 U. S. 16, 84 L. ed 1050, 60 S. Ct. 749.

Adoption of Amendments to the United States Constitution

Coleman v. Miller, 307 U. S. 433, 83 L. ed 1385, 59 S. Ct. 972;

Luther v. Borden, 48 U. S. 1, 12 L. ed 581.

Status of War or Peace

United States v. Lee, 106 U. S. 196, 27 L. ed 171, 1 S. Ct. 240.

Status of Vessel as Prize of a War

The Florida, 101 U. S. 37, 25 L. ed 898.

Recognition of State Government

State of Texas v. White, 74 U. S. 700, 19 L. ed 227.

Boundaries of Nation

Foster v. Neilson, 27 U. S. 253, 7 L. ed 415.

Jurisdiction of Land Claims of Foreign Origin

Tameling v. U. S. Freehold and Immigration Company, 93 U. S. 644, 23 L. ed 998.

Venue of Actions in District Court

U. S. v. Union Pacific Railroad Company, 98 U. S. 569, 25 L. ed 143.

Definition of Obstructions to Navigation

United States v. Appalachian Electric Power Company, 311 U. S. 377, 61 S. Ct. 291, 85 L. ed 243.

We similarly suggest that the necessity or desirability of establishing a legislative investigating committee and prescribing its subject of inquiry and its mode of operation is again purely a political question subject only to those traditional safeguards which have uniformly been accorded to persons summoned before such committees, that is, the rights to object to improper questioning and to have any issue of contempt determined in a judicial proceeding.

b. The motives of the legislature and its members in taking any action in forma legis within the scope of its powers may not be inquired into

Supplementing the citations in petitioner's brief in support of the above proposition we respectfully offer the following:

In *Fletcher v. Peck*, 6 Cranch. 129 it was stated that the respect which the court entertains for the legislative department of the government as well as grave reasons of public policy might forbid any inquiry into the motives of the legislative body with a view of defeating the operation of any public legislative enactment. In *Ex parte McCardle*, 7 Wall. 513, 74 U. S. 506, 19 L. ed 264, the court stated:

> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the constitution."

In *Doyle v. Continental Insurance Company*, 94 U. S. 541 the court stated:

> "If the act done by the state is legal, is not in violation of the constitution, . . . it is quite out of the power

of any court to inquire what was the intention of those who enacted the law."

This principle is also followed in the following cases:

State of Arizona v. State of California, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed 1154;

Smith v. Kansas City Title and Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. ed 577;

A. Magnano Company v. Hamilton, 292 U. S. 40, 78 L. ed 1109, 54 S. Ct. 599;

Henneford v. Silas Mason Co., 300 U. S. 577, 81 L. ed 814, 57 S. Ct. 524;

Fox v. Standard Oil Company of N. J., 294 U. S. 87, 55 S. Ct. 333, 79 L. ed 780;

State of Oklahoma ex rel. Phillips v. Guy S. Atkinson Co., 313 U. S. 508, 61 S. Ct. 1050, 85 L. ed 1487.

In view of the uniformity of application of the rule from the time of *Fletcher v. Peck* down to the most recent pronouncements of this court, we respectfully suggest that the rule of *stare decisis* is applicable and that in view of the need for a reasonable degree of certainty in the law this proposition cannot now be inquired into.

We recognize that the proposition may have effect only when the legislative body is acting under due forms of law, that is, in *forma legis*. That is, if by some almost inconceivable chance a legislative committee should become so benighted as to use its subpoena and inquisitorial powers as a prelude to unlawful sanctions of the type employed in the case of *Screws v. United States*, 325 U. S. 91, 89 L. ed 1495, 65 S. Ct. 1031, then under the rule in that case its

motive, that is, its wilful intent, would immediately become material. But when the legislative committee is acting under due forms of law, the persons affected by its actions are in fact receiving due process of law and hence have no grounds for complaint. While the term "due process of law" is not susceptible of exact definition, there is respectable authority that it is the equivalent of the term "law of the land (per legem terrae)" as set forth in Magna Charta. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed 616; Brannon, The Fourteenth Amendment, p. 138. In fact Lord Coke defined "law of the land" as "the old law of the land; that is, by the *due course and process of law.*"

We respectfully suggest that actions and procedures which follow the traditional and customary forms of law and of legal action are in fact due process. In the case of *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. ed 569, 4 S. Ct. 663, it is stated:

> "It is sufficient to say that by due process of law is meant one which following *the forms of law* is appropriate to the case and just to the parties to be affected. It must be pursued *in the ordinary mode* prescribed by law."

And again it has been stated:

> "Due process means in the due course of legal proceedings *according to the rules and forms* established for the protection of private rights." *Westervelt v. Gregg*, 12 N. Y. 209.

In the case of *Fletcher v. Peck, supra*, the court founded its decision that the motives of the legislature could not be inquired into on one consideration that, "the act be clothed with all the requisite forms of a law." The requisite of

passage in proper form as a condition of validity was also recognized in *Calder v. People of Michigan*, 218 U. S. 591, 31 S. Ct. 122, 54 L. ed 1163.

In *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed 749, the court stated that settled usages and modes of procedure previously existing under the common law are determinative of due process. This rule was also recognized in the following cases:

Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158;

Patterson v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158;

Weems v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed 158.

In Spanish law the phrase "en debida forma" which is translated "in due and proper form" in legal meaning is translated as "in due process of law." Escriche Diccionario. 26 C. J. 983.

Accordingly in the present case when the complaint shows on its face that the legislative investigating committee proceeded in accordance with the traditional forms and customs of such committees it would appear that any witness who appeared before it has in fact been accorded due process of law, and any inconvenience he may have suffered is *damnum absque injuria*.

The record shows that the committee was established in form by act of the legislature, that it was duly convened and organized for the purpose of pursuing its inquiries, that Brandhove was summoned as a witness by service of a subpoena, that he appeared before the committee in formal session accompanied by his counsel, that he was questioned

in the presence of the committee and counsel and declined to answer, that no sanctions were applied to him in the presence of the committee, that thereafter the legality of his failure to answer the questions was submitted to a court formally and regularly convened and, finally, that a jury refused to convict Brandhove of wrongful conduct in refusing to answer the questions. We suggest that the foregoing procedure satisfies all requirements of the traditional forms and practices of legislative investigating committees. If Brandhove was thereby inconvenienced, his inconvenience was no greater than that of a witness at a trial, or of a juror at a trial, or one who is called upon to aid a peace officer in the performance of his duty, or one who is ordered into the service of the Armed Forces of his country. In all such cases, there is an interference with liberty which does not in every case result from a judicial process, yet in every case it would be recognized that such interference is a result of due process of law. If Brandhove was put in fear by this course of conduct, the outcome of the proceedings shows his fears were unjustifiable. At no time does he even allege that there was any threat to apply to him the sanction of unlawful force or any other sanction that might give rise to a legal injury.

It is submitted that the record shows the legislative committee acted in due form of law and hence its motives cannot be inquired into.

IV. By His Oath of Allegiance to the Communist State, Brandhove Expatriated Himself and Is No Longer Entitled to Assert the Privileges and Immunities of Citizenship in the United States of America or the State of California.

The principle above stated was not raised in the lower court. While it is generally true that questions not raised in the lower courts will not be considered on appeal, there is a well recognized exception in the cases of questions of public policy or of great public interest. 3 C. J. 742. We suggest that the question herein raised is of crucial importance and that the court does have power to consider it if it so chooses.

We respectfully suggest that the time has come to apply to bodies politic and corporate in the political field that same salutary principle of law which has long been applied to bodies corporate in the economic field. The essence of the rule is that the fiction of corporate personality may not be asserted for the purpose of evading a statute or perpetrating a fraud. That is, if a certain course of conduct is forbidden to a man or a group of men by a controlling statute, they cannot engage in and gain the benefits of that course of conduct by the device of forming a corporation and asserting the existence of a separate corporate entity. Similarly, if the course of conduct is forbidden to a class of corporations, as railroad corporations are forbidden to grant rebates to shipping corporations, the shippers cannot form a second corporation for the purpose of receiving the rebate and assert its acts are not its own. In a host of such cases our courts throughout the land have uniformly held that the separate corporate entity will be disregarded and the court will look at and pass upon the facts as they

are. A minimum citation of representative authorities and cases will serve to remind the court of the soundness of this proposition. They are as follows:

Wormser, *Disregard of the Corporate Fiction*, Baker, Voorhees and Company, 1929;

Efficacy of the Corporate Entity in Evasion of Statutes, 26 Ia. L. Rev. 350 (1940-41);

Fletcher, *Cyclopedia of Corporations*, Vol. 1, p. 170 (Perm. Ed.);

Ballentine, *Separate Entity of Parent and Subsidiary Corporations*, 60 Am. L. Rev. 19 (1926);

Canfield, 17 Col. L. Rev. 128 (1917).

Wormser states:

"When the conception of a corporate entity is employed to defraud creditors, to evade an existing obligation, *to circumvent a statute* to achieve or perpetuate monopoly, *or to protect knavery or crime*, the court will draw aside the web of entity, will regard the corporate company as an association of live, up and doing, men and women shareholders, and will do justice between real persons." Page 84.

United States v. Milwaukee Refrigerator Transit Company, (Ed. Wis. 1905) 142 Fed. 247;

United States v. Lehigh Valley R. R. Co., (1911) 220 U. S. 257, 31 S. Ct. 387, 55 L. ed 458;

Anderson v. Abbott, (1944) 321 U. S. 349, 362, 64 S. Ct. 531;

People v. Michigan Bell Telephone Co., 224 N. W. 438 (Mich. 1929).

We suggest that an application of similar principles to the so-called Communist party will show that it is not a political party in the commonly accepted sense of the word at all, but that it is in fact the Communist State with its headquarters in Moscow, Russia, and operating under the name and style of the Soviet Union.

We suggest that at the present time this status has become a matter of common knowledge of which this court may take judicial notice. Whatever honest doubts may have existed in the trying and troublesome times of 1942 and 1943 when the case of *Schneiderman v. United States of America*, 320 U. S. 118, 87 L. ed 1796, was decided, surely the events of the past five years have washed away every last vestige of ground on which they might rest. In nation after nation we have watched the so-called local Communist party rise as a vanguard of Communist arms bent on conquest and have witnessed the leaders of the party thereafter render slavish devotion and obedience to their masters in Moscow. We have observed the citizens of the Communist State in America, who go by the name of the members of the Communist party, follow with unswerving fidelity every twist and turn in the policy laid down by their acknowledged supreme ruler. We have heard those persons who sought to break away from the rule of Moscow denounced as traitors. Can it be believed that a person who has pledged his allegiance to such an organization has not thereby pledged his allegiance to that particular government which goes by the name of the Union of Socialist Soviet Republics, and if he has so pledged his allegiance, has he not as effectively expatriated himself as though he had transferred his allegiance to the Crown of Britain or the Republic of France?

In the *Schneiderman case* it was recognized that party members pledged their adherence to Communist party principles and tactics. One recently circulated version of the oath now taken by Communist party members in America concludes with the sentence:

> "I pledge myself to rally the masses to defend the Soviet Union, the land of victorious socialism, I pledge myself to remain at all times a vigilant and firm defender of the Leninist line of the Party, the only line that insures the triumph of Soviet Power in the United States."

We submit that any pledge of adherence to Communist party principles, in whatever double talk it may be concealed, is in fact a pledge of allegiance to a foreign state and that any person who makes that pledge is thereby expatriated.

The foregoing considerations are material in the present case for the reason that the petition before the district court filed by Brandhove contains a reference to a document which describes him as a former admitted member of the Communist Party, and nowhere in Brandhove's own petition is that statement denied. Hence it must be taken as a verity.

The reference to *former* membership is immaterial. Citizenship in the United States of America is not a privilege that may be taken off lightly and resumed at will. An expatriate is an alien just as much as a person who is born in a foreign land and the privileges of citizenship can only be restored by naturalization.

If it is recognized that Brandhove has expatriated himself then clearly he is not entitled to assert the right of peti-

tion to the legislature since that is a right of citizenship as is fully established by petitioners' brief in this court.

CONCLUSION

We respectfully submit that the judgment of the circuit court of appeals should be reversed with directions to dismiss the complaint. Over and above the right of any individual to enjoy the right of free speech is the right of all the peoples to confer upon their legislators an unlimited and untrammeled right of free speech, free discussion and free examination of issues. This right of all the people would be severely abridged if a rule should be established whereby those legislators would henceforth be subject to the sanctions of vexatious legislation even for acts undertaken under traditional and customary forms of procedure.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S PETITION FOR A REHEARING.

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RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, William Patrick Brandhove, herewith submits this his Petition for a Rehearing in the above-entitled cause and respectfully states:

REASONS FOR GRANTING A REHEARING IN THIS CAUSE.

I.

UNDER THE COURT'S DECISION IN THIS CASE, A VIOLATION OF A RIGHT GUARANTEED BY THE UNITED STATES CONSTITUTION STANDS WITHOUT REMEDY AND SUCH RIGHT IS THEREFORE DENIED.

It is axiomatic that a civil right cannot exist in the absence of a remedy for the violation thereof.

A civil right protected by the Federal Constitution against State action can be violated only by action taken under color of State Law.

Collins v. Hardyman, ... U.S. .....; 95 Ad. L. Ed. 806.

If the action taken is not under color of State law, hence not attributable to the State, this Court holds that redress must be sought under State law.

Collins v. Hardyman, ... U.S. .....; 95 Ad. L. Ed. 806.

In the instant case, a Committee of the California State Legislature has acted under color of the authority vested in it by the State law. That there was State action here is therefore clear and stands unquestioned.

Any immunity bestowed upon such Committee by State law makes the conclusion inescapable that either the Federal law provides for a remedy or that there is no remedy.

If the Federal law likewise makes such State action immune from redress, then such action, although unconstitutional within the Federal System, can be taken by the State with impunity.

This Court, in conferring immunity upon a State Legislative Committee and its members for action taken in violation of a citizen's rights under the United States Constitution in effect, for the first time in its history, denies the axiom that the States cannot circumvent the barriers set to their power by the Federal Constitution and Acts of Congress thereunder.

Under this decision, a State Legislative Committee, exercising State power against a citizen is allowed to overcome the Constitutional prohibitions against infringement of free speech, the right to petition the government for redress of grievances and the right to due process of law.

II.

THE LEGAL HISTORY, AS REFERRED TO IN THIS COURT'S DECISION, DOES NOT CONCERN A FEDERAL SYSTEM AND THE LIMITATIONS ON STATE POWER THEREUNDER.

The Court refers to the privilege of legislators to be free from arrest or civil process for their participation in legislative proceedings which is traced to

the parliamentary struggles of the 16th and 17th centuries in England. The powers of Parliament in England were and are vitally different from the power of any State Legislature of the United States. The fundamental difference lies in the sovereignty vested in the English Parliament with the result that the powers of this body are practically unlimited, whereas there are Federal limitations upon the powers of the States by virtue of the United States Constitution. These limitations of State power are equally limitations on their Legislatures, their legislative committees and the members thereof.

> "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government."
>
> *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680.

See:

Shelley v. Kramer, 334 U.S. 1, 15;
Ex Parte Virginia, 100 U.S. 339, 346-347.

See also:

Screws v. United States, 325 U.S. 91, 114, 133.

The decisive question presented in this case is whether a State Legislative Committee is subject to sanctions for violating the written Constitution of The United States, a problem which has no analogy where privileges of the English Parliament are involved. Notwithstanding this fact, there is no precedent in English history and none has been referred to by this

Court where immunity was granted to members of Parliament for forceful action based upon authority demanding obedience from a citizen, as distinguished from the exercise by members of Parliament of their privilege of freedom of speech and debate.

Respondent has emphasized in his brief and oral argument to this Court that speech may be met by speech, not by force. Here Respondent was subjected to force based upon State authority which took the matter out of the realm of free speech and debate of parliamentarians. Thus force was used and compulsion was involved. Among other things, Respondent was compelled to appear as a witness at a State hearing; to comply with the duties of a witness thereat; to go to jail first and then to stand trial for refusing to answer questions placed to intimidate and deter him from exercising his federal constitutional rights relied upon in his complaint.

The Massachusetts case of *Coffin v. Coffin*, 4 Mass. 1, from which a dictum has been quoted in this Court's decision, did not involve the exercise of State power against a citizen, let alone the exercise of such power in violation of the supremacy of the United States Constitution.

III.

THE COURT'S INTERPRETATION OF THE CIVIL RIGHTS STATUTES (8 U.S.C. SECTIONS 43, 47(3)) IS IN CONFLICT WITH THEIR PURPOSE AND FUNCTION, WHICH IS TO IMPLEMENT THE XIV AMENDMENT BY PROVIDING SANCTIONS AGAINST STATE ACTION IN DEFEASANCE OF SAID AMENDMENT.

Applying accepted rules of statutory interpretation, the clear language of a statute must prevail in the absence of compelling reasons showing that the statute does not mean what it says.

The language of the statute in question is clear and unambiguous in directing its proscription and providing sanctions against "Every person", who under color of state law "subjects or causes to be subjected any citizen of the United States * * * to the deprivation of any rights, privileges or immunities secured by the Constitution and laws * * *"

This language unequivocally expresses the intent of Congress to bring within its prohibition *everyone* who under color of State law takes the forbidden action, and any exception in favor of a person exercising State authority defeats the purpose of making XIV Amendment Rights impregnable against State power.

This reasoning underlies the decision in *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240, which holds that immunity, if any, bestowed by common law upon judges exercising state judicial power as well as immunity of a Governor conferred by State law, offers no protection against the provisions of the Federal Civil Rights Statutes (8 U.S.C. sections 43, 47(3)).

In enacting these Civil Rights Statutes, the Congress made its choice within its constitutional powers; it placed the protection of the Federal rights of citizens higher than any interest of the State in the freedom of action of its agents.

If this choice now seems unwise, it would be for the Congress to correct.

IV.

THE REASONING OF THE COURT WITH RESPECT TO IMMUNITY OF THE INDIVIDUAL COMMITTEE MEMBERS FROM CIVIL LIABILITY HAS NO APPLICATION TO THE STATE LEGISLATIVE COMMITTEE AS SUCH.

Assuming that the Congress had made its choice to protect state legislators from personal damages where the violation of Constitutional rights is involved, does it follow that a State Legislative Committee, as an entity, should enjoy such immunity?

As we understand the Court's decision, legislators should not be restricted by fear of claims directed at them; this reasoning obviously does not apply to a State Legislative Committee whose liability is equivalent to liability of the State.

Respondent sued the Legislative Committee in question as an entity as well as the individual members thereof in this cause; in this connection it is respectfully submitted that, if the Court will re-examine this issue which was properly raised by Respondent in his complaint and Brief to this Court, a different judgment would obtain.

V.

THE FACTUAL SITUATION PRESENTED BY THE RECORD IN THIS CASE.

The Court has stated in its decision that the question of the scope of legislative privilege has only been considered as applied to the facts of the present case.

As stated in Respondent's Brief, this case is here solely upon the pleadings which consist of Respondent's complaint and Petitioners' motion to dismiss the same. The sole question presented is whether Respondent's verified complaint states a claim for relief against Petitioners under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

Unless the Court has now departed from the recognized rule of pleading that, upon a motion to dismiss or equivalent motion, the well pleaded facts of a complaint must be taken as true, Respondent is convinced that a re-examination of his complaint, to which no verified denial or answer has been filed, will convince the Court that a valid claim for relief is stated by him.

In this connection, Respondent respectfully points out that the following statements contained in the Court's decision are not supported by the record in the cause:

1. "In view of the conflict between this petition and evidence previously given by Brandhove, the Committee asked local prosecuting officials to institute criminal proceedings against him."

In this regard, it is respectfully submitted from the record:

(a) That there is in fact no conflict between Brandhove's petition to the California Legislature and evidence previously given by him to the legislative committee in question. (R. 18-22; 66-69.). The recognition of a purported conflict, it is respectfully submitted, is an invasion by the Court of the province of the trier of facts.

(b) That the reason for the Committee asking local prosecuting officials to institute criminal proceedings against Respondent, after he circulated his petition and before the Committee hearing, was in fact: "with malice and intent to intimidate and silence plaintiff (Respondent) and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, * * *" (Complaint, R. 10).

2. "Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern."

In this regard it is respectfully submitted from the record:

(a) That Brandhove, nowhere in the record before this Court, or otherwise, indicated that evidence pre-

viously given by him was false. This is a conclusion of Petitioners Tenney and Burns in State telegrams sent to local officials (R. 23-26) devoid of actuality in fact; nor has the credibility of these Petitioners been tested or the record of the previous evidence be scrutinized upon this issue in a court of law.

(b) That the Committee at the time in question was not investigating a problem within legislative concern, but on the contrary, as alleged by Respondent in his complaint, held said Committee hearing: "for the purpose and object of suppressing the criticism of plaintiff (Respondent) in his circulated petition * * *" and "acted as judges and accused in the same cause." (R. 6-7.) In this connection it is also pleaded by Respondent that the subpoena requiring him to be present at the Committee hearing did not refer to or state the purpose or object of said hearing or of Respondent's required testimony. (R. 5, 22.)

> 3. "Damages of $10,000 were asked 'for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense' in the contempt proceeding arising out of the Committee hearings. The plaintiff also asked for punitive damages."

In this connection the attention of the Court is respectfully directed to paragraph 15 and the prayer of Respondent's complaint which include general damages suffered by Respondent for the deprivation of his most sacred Constitutional rights in addition to the items of special and punitive damage mentioned in the Court's decision (R. 10-11).

CONCLUSION.

The present case, on the record before the Court, presents a serious encroachment by State action upon the rights of a citizen secured and protected under the United States Constitution. Even more serious is the implication that this decision affords an opportunity to the several States to circumvent the Federal System and avoid the constitutional limitations of the XIV Amendment.

From the foregoing it is respectfully urged that the Court grant a rehearing to Respondent in this cause and upon further consideration in the premises, reverse the decision of the District Court, and with regard to Petitioners, affirm the decision of the Court of Appeals in this case.

Dated, San Francisco, California,
July 16, 1951.

Respectfully submitted,
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Attorneys for Respondent and Petitioner.

Certificate of Counsel.

I hereby certify that I am of Counsel for Respondent in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 16, 1951.

Martin J. Jarvis,
Of Counsel for Respondent.

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Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-125) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The sole question presented is whether Respondent's complaint states a claim for relief under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

In the light of Petitioners' contentions, the following subordinate questions will be discussed:

(a) Are members of State Legislative Committee and the Committee subject to liability under the Civil Rights Statutes or are they immune from such liability?

(b) Is a citizen of the United States, in circulating a petition among the legislators of his own State, protected by the First Amendment to the Federal Constitution as read into the Fourteenth Amendment or is such a citizen left without protection under the United States Constitution?

(c) Are the Federal Courts powerless to determine whether members of a State Legislative

Committee and such Committee itself have abused their State powers with the intent and object of silencing a political opponent and intimidating and deterring him in proposing discontinuance of appropriation of funds for such Committee?

In addition, the following subordinate questions are raised by Respondent:

(1) Can a State Legislative Committee and its members escape the scrutiny of the Federal Courts where due process of law, equal protection under the laws and the guarantee of equal privileges and immunities of a citizen have been violated by them against a political opponent in an attempt under color of State law to silence such opposition?

(2) Is the California Senate Resolution (R. 12) creating the Senate Fact-Finding Committee on Un-American Activities unconstitutional for lack of definiteness and certainty as applied to the facts pleaded in Respondent's complaint?

STATUTES INVOLVED.

The pertinent provisions of the Civil Rights Statutes involved are set forth in the Petition at pp. 10-11.

STATEMENT.

On January 28, 1949, respondent, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State Capitol in Sacramento. (R. 4, 18-22.) The subject matter of said petition was stated therein as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end" (R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (R. 19-20), and the stated purpose of said petition was to persuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (R. 5, 18-22).

While respondent was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949. (R. 5, 22-23.) No reference was made in said subpoena to

the purpose or object of said hearing, or of the testimony required thereat. (R. 5, 22-23.) Before the service of said subpoena on respondent, but after the content of said circulated petition had become known to petitioner, Jack B. Tenney, said petitioner, the chairman of the criticized committee, discussed with defendant Elmer E. Robinson the best ways and means of defeating the effect and purpose of said petition and they then and there agreed that the aforementioned hearing should be held, and that defendant, Elmer E. Robinson should appear at said hearing as a voluntary witness to deny the truth of the contents of respondent's petition. (R. 5-6, 45-47.)

On the same day, to wit, January 28, 1949, and in order to silence respondent and defeat the effect of his said petition, petitioners Jack B. Tenney and Hugh M. Burns, chairman and vice-chairman respectively of The Tenney Committee, with regard to respondent's circulated petition, sent State telegrams to two District Attorneys of the State of California, demanding on behalf of said Committee that respondent be prosecuted for perjury. (R. 6, 23-25.)

A hearing was held by The Tenney Committee on the next day, to wit, January 29, 1949, at which all petitioners were sitting as members of said Committee, and at which defendant, Elmer E. Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness. (R. 6, 27-28, 47.) At said hearing defendant Elmer E. Robinson was permitted to make a lengthy unsworn statement first (R. 7, 45-48) and after having been sworn as a volun-

tary witness was given unbridled discretion in conducting a self justification of the charges contained in respondent's said petition. (R. 7, 50-67.) Pursuant to the subpoena served upon him, respondent appeared at said hearing and after answering questions as to his identity (R. 28) objected to the committee's further questions on the ground that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in respondent's petition to the California Legislature and was therefore then acting as judge and accused in the same case thereby exceeding its power and jurisdiction. (R. 8, 28-32, 35-38.) These objections were overruled by The Tenney Committee (R. 32) and respondent was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him. (R. 7, 38-41, 42-43.) At said hearing petitioner Jack B. Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of respondent and a newspaper article wherein an affidavit of respondent was called a "tissue of lies!" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to petitioner Jack B. Tenney "that Mr. Brandhove (respondent) was a liar. (R. 7, 43-45, 74.) Furthermore, at said hearing respondent's counsel, although he was not summoned, was called as a witness by said Committee and interrogated at length about his private affairs, and when he referred to decisions of the United States

Supreme Court supporting the objections raised by respondent against said hearing and supporting respondent's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room. (R. 7-8, 48-50, 34-35.) At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of respondent's refusal to answer questions thereat. (R. 8, 42.) Such complaint charging respondent with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by petitioner, Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. (R. 8, 74.) Upon said complaint, respondent was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949. (R. 8.) Respondent was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949, on which latter date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction. (R. 9.) Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the respondent discharged. Respondent committed no public offense at said hearing since the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution and under the resolution creating The Tenney Committee (R. 12)

and that the questions asked of respondent were not material or proper as required by section 9412 of the California Government Code. (R. 8-9.) After respondent's discharge from custody, he brought this action for damages under the Civil Rights Statutes alleging that the acts of the petitioners and defendant Robinson above set forth were done or participated in with malice and intent to intimidate and silence respondent and to deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances; that he was deprived of the equal protection of the laws, due process of law and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law (R. 10); that the acts of all petitioners were done under color of State authority; that all petitioners, together with defendant Robinson, conspired for the aforesaid purposes and acted as above set forth in furtherance of such conspiracy. (R. 10.)

Upon petitioners and defendant Robinson's motions to dismiss complaint (R. 76-85, 89-97) the District Court made its order granting said motions (R. 124-125) and entered judgment dismissing respondent's action on the merits. (R. 125-126.)

On appeal from the judgment of the District Court (R. 126) the Court of Appeals for the Ninth Circuit reversed the judgment with remand as to petitioners and affirmed the judgment with regard to defendant Robinson. (R. 137, 183 F. (2d) 121.)

Petitioners seek review of the action of the Court of Appeals adverse to them on certiorari in the premises; respondent seeks review of that portion of the judgment of the Court of Appeals favorable to defendant Robinson on cross-petition for certiorari to be filed in this honorable Court.

ARGUMENT.

A.

STATE LAW CANNOT VEST ANY PERSON WITH IMMUNITY TO VIOLATE THE FEDERAL RIGHTS OF ANOTHER.

It is axiomatic under our constitutional system that State power, by whomsoever exercised, is subject to the United States Constitution and the Statutes of Congress enacted thereunder.

If a State could clothe its Legislative Committees or the members thereof with power to violate fundamental federal rights in disregard of the Civil Rights Statutes (8, U.S.C., §§ 43, 47(3)), then the Federal Constitution and the Civil Rights Statutes protecting the rights of citizens thereunder would be a the mercy of such Committee and their members—a patent absurdity.

It is the essence of the provisions of the Civil Rights Statutes to protect all individuals within the jurisdiction of the United States from any exercise of State authority in violation of the federal rights of that individual.

It is immaterial whether the person who violates the federal rights of another by exercise of State authority acts in conformity with State law.

United States v. Classic, supra, 313 U.S. 299, 326:

"Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Ex parte Virginia, 100 U.S. 339, 346, 347:

"* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

Screws v. United States, 325 U.S. 91, 114 and 133.

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it

supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated." (Rutledge, J., concurring in result, *Screws v. United States*, p. 133.)

In *Picking v. Pennsylvania Ry. Co.*, 151 F. (2d) 240, it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (p. 250), and further: where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York arose under section 47 Title 8 U.S.C., Pennsylvania statutes sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Act. (p. 251.)

Whether the federal law, as distinguished from State law, can vest such immunity in anyone exercising federal governmental power is not in issue in this case, and therefore authorities cited by petitioners with respect to Congress or congressional committees cannot support their contention that they are immune from the sanctions of the Civil Rights Statutes.

There is a fundamental difference between the rights conferred upon a person by the Civil Rights Statutes against the abuse of State power and his remedies against abuse of Federal power by Congressional Committees or public officers of the Federal government. While the Civil Rights Statutes give a cause of action for damages against anyone acting under color of State law who has violated Federal rights of the complaining party, a rule of immunity has been applied to Congressional Committees and Federal officers, which has been stated in *Barsky v. United States*, 167 F. (2d) 241, 250, as follows:

> "The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused, 'affords no ground for denying the power.' The question presented by these contentions must be view in the light of the established rule of absolute immunity of governmental officials, Congressional and Administrative, from

liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity within the respective power of the legislative and the executive."

Since the Civil Rights Statutes and the decisions of the United States Supreme Court and other Federal Courts constr uing them make it clear that the Federal rights of citizens protected thereunder shall not give way to any power or immunity which State law may attempt to confer upon any State body or State official, it would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barsky v. United States,* 167 F. (2d) 241; *Dennis v. United States,* 171 F. (2d) 986 and *Eisler v. United States,* 170 F. (2d) 273. It may be said in passing, however, that even as to the power of Congresssional Committees it was stated in *McGrain v. Daugherty,* 273 U.S. 135, 175-176:

"We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*[1] and *Marshall v. Gordon*[2] point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v.*

[1] 103 U.S. 168.
[2] 243 U.S. 521.

Thompson and *Re Chapman*[3] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

See also: *Jones v. Security Exchange Commission*, 298 U.S. 1, 26, holding that a citizen, when interrogated about his private affairs, has the right before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, may not be compelled to answer.

B.

THE UTTERANCE OF A POLITICAL OPINION BY CIRCULATING A PETITION AMONG STATE LEGISLATORS IS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AS READ INTO THE FOURTEENTH AMENDMENT.

No prolonged argument seems necessary to meet petitioner's contention that the right to petition the legislature of a State is not protected by the federal constitution for their reason given that the First Amendment protects the right to petition only the Federal government for redress of grievances.

The First Amendment, as such, is not a limitation on State power; it limits State power, however, by being read into the Fourteenth Amendment.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 639.

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[3]166 U.S. 661.

Since the Fourteenth Amendment is "an instrument for transmitting the principles of the First Amendment," it is clear that on such transmittal, the principles of the First Amendment necessarily become qualified to make them effective against State power rather than federal power.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 639.

Obviously the right to petition the "government" becomes the right to petition the State government rather than the Federal government when the First Amendment is transmitted into the Fourteenth.

Furthermore, no citation of authorities seems necessary to point out that the right to petition the government for redress of grievances is included in the right of free speech and, as such, is protected as free speech wherever that right is recognized.

C.

UNDER THE CIVIL RIGHTS STATUTES, THE FEDERAL COURTS ARE EMPOWERED TO DETERMINE WHETHER A STATE LEGISLATIVE COMMITTEE OR ITS MEMBERS HAVE VIOLATED THE FEDERAL RIGHTS OF ANOTHER BY INTENTIONAL ABUSE OF STATE POWER.

(1) The power of the Federal Courts to protect Federal rights under the Civil Rights Statutes extends to anyone clothed with State power who intentionally deprives a citizen of his Federal rights.

Where State power is used for such an end, the abuse cannot be excused by the fact that the same power could have been used for a proper end. As stated by Mr. Justice Holmes speaking for this Court in *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114:

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, U. S. v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

It is axiomatic that the same power which may be constitutionally exercised under one set of facts, becomes unconstitutional and unlawful if exercised under different circumstances.

In the instant case we are not concerned with the investigatory and inquisitorial power of State Legislative Committees for an end that is lawful under the Federal law. We are here concerned with an exercise of such State power for an unlawful end, namely, to deprive a citizen of fundamental Federal rights. The question here involved is not the motive[4] of the Committee and its members, but is whether or not they acted with the intent and for the purpose of silencing a political opponent by abuse of State power.

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[4] "'Motive' and 'intent' are not identical, and an intent may exist where a motive is wanting. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. In the popular mind, intent and motive are often regarded as the same thing; but in law there is a clear distinction between them. * * *" Black's Law Dictionary, 3rd Ed., p. 1209, and cases there cited.

Where the invasion of Federal constitutional rights is at issue, the scrutiny of the Federal Courts extends of necessity to factual questions, such as intent, deliberate planning and malice. As stated in *Oyama v. California*, 332 U.S. 633, 636:

> "In approaching cases such as this one, in which federal constitutional rights are asserted, it is incumbent on us *to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.*" (Emphasis added.)

In the *Oyama* case this Court referred to *Patton v. Mississippi*, 332 U.S. 463, 465, where the impact of the principle against deliberate exclusion of Negroes from a jury was stated as follows:

> "A long and unbroken line of our decisions * * * has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.' *Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case.*" (Emphasis added.)

See also, *Shelley v. Kramer*, 334 U.S. 1.

If, as alleged by respondent, the Committee in question and its members acted with such intent and

for such unlawful end, they cannot escape the sanctions of the Civil Rights Statutes and the word "motive" cannot be used as a magic wand to obliterate the manifest purpose of the Federal Constitution and those Federal statutes enacted to protect civil rights.

See: *Cook v. Marshall County*, 196 U.S. 261, 271 infra.

(2) The doctrine of separation of powers, important as it is in determining judicial review of acts of Congressional committees by Federal Courts has no application where the issue is abuse of State power in collision with Federal rights.

In the instant case we are not concerned with the question whether Federal Courts can check the abuse of the powers of Congress and Congressional Committees, or whether the principle of separation of powers bars the Federal Courts either absolutely or to some extent from such review. If *State action*, as distinguished from Federal governmental action, is involved, the Federal Courts are not barred from exercising their power to protect the Federal rights of citizens, regardless of whether the asserted violation of such rights emanates from the legislative branch or any other branch of the State government. "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 680; *Shelley v. Kramer*, 334 U.S. 1, 15.

D.

IN ADDITION TO THE ABRIDGEMENT OF RESPONDENT'S RIGHTS OF FREE SPEECH AND PETITION, RESPONDENT WAS DEPRIVED OF DUE PROCESS OF LAW, THE EQUAL PROTECTION OF THE LAWS AND EQUAL PRIVILEGES AND IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES AT THE LEGISLATIVE COMMITTEE HEARING IN QUESTION.

(1) Violation of due process of law.

It cannot be seriously questioned that the issue of violation of due process of law has been properly raised by respondent's complaint. In this regard it must be noted that the record of the hearing in question together with the events preceding it are pleaded verbatim and made a part of Respondent's complaint. (Complaint paragrs. 8, 3; R. 4-5, 7-8, 22-23, 26-75.)

To conclude that Respondent was not deprived of both procedural and substantive due process under the Fourteenth Amendment of the United States Constitution by State authority at the Committee hearing in question would mean to say that a State legislative committee, becoming aware of a citizen's criticism and protest against a further appropriation of funds for that committee, for the purpose of suppressing that criticism, can act as judge and *accused* in the same cause; that such a committee can lawfully and while the citizen is actually engaged in such criticism, subpoena him to appear at a hearing without disclosing in such subpoena the purpose thereof, and at such hearing, in addition to interrogating the citizen with questions, sworn answers to which that committee had previously obtained from that citizen,

can vilify and discredit that citizen by reading into the record of such hearing a false alleged criminal record of that citizen; a newspaper article wherein an affidavit of that citizen was called a "tissue of lies"; and an alleged telephonic statement that that citizen "was a liar"; and further at such hearing can deter and intimidate that citizen by interrogating his counsel, present thereat with permission of such committee, and without justification or excuse, threaten expulsion of such counsel from the hearing room.

If such is a fair and impartial hearing as contemplated under the Fourteenth Amendment of the Constitution of the United States, then Respondent admits that he has failed to state a claim for relief on such ground.

(2) Denial of equal protection of the laws.

This Court will observe from the facts pleaded (Complaint paragrs. 7, 8, and 11; R. 6-9, 26-75) that respondent and his counsel, in contradistinction to the defendant Robinson, were singled out for obvious unfair treatment as witnesses at the Committee hearing in question which warrants respondent's contention that the Equal Protection Clause of the Federal Constitution was violated by abuse of State authority as to him.

(3) Abridgement of the privileges and immunities of respondent as a citizen of the United States.

The Federal rights of respondent to freedom of speech, to petition the government for redress of

grievances, to procedural and substantive due process of law and to equal protection of the laws are included under the privileges and immunities clause of the Federal Constitution, Amendment Fourteen.

It is apparent from the Committee hearing in question, without reiteration of the particulars hereinabove set forth, that respondent, as a citizen of the United States, was denied these privileges and immunities by abuse of State power.

See: *Hague v. C. I. O.*, 307 U.S. 496.

E.

THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE COMMITTEE IN QUESTION KNOWN AS THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES IS UNCONSTITUTIONAL

The California Senate resolution creating The Tenney Committee (R. 12-18) violates the due process clause of the Federal Constitution in that it lacks the degree of certainty which is required in a statute or other rule of state law, affecting fundamental rights, as applied to respondent.

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;

In re Di Torio, 8 F. (2d) 279, 281;

Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

The issue of the constitutionality of said resolution is raised however only in the alternative; it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of the resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 23, 1950.

Respectfully submitted,
GEORGE OLSHAUSEN,
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